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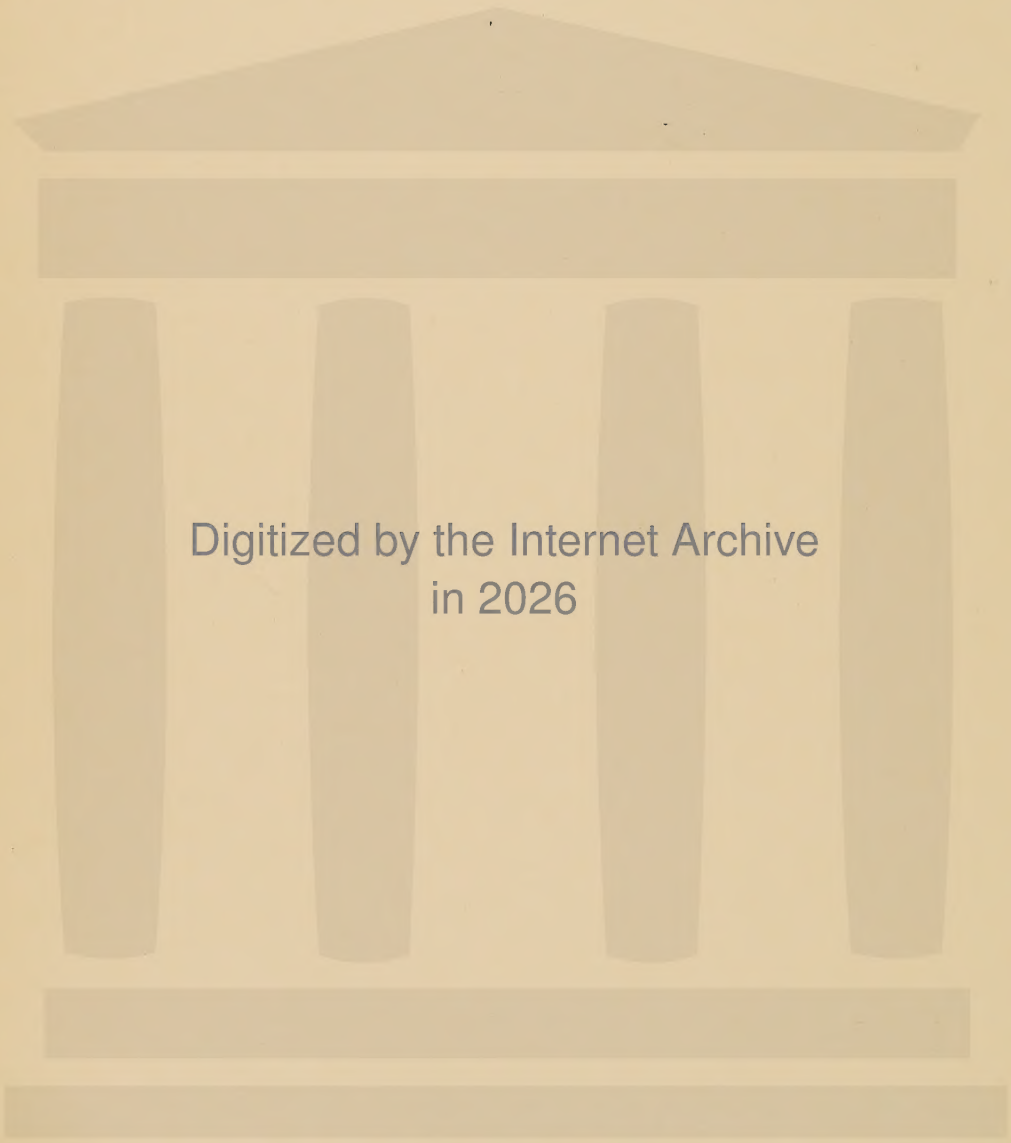
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FOREWORD

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VOLUME 3

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CONSTITUTIONAL LAW - DUE PROCESS

PRICE FIXING OF COMMODITIES - MILK

If not as unusual as some economists would have us believe, the spectacle of starvation and poverty and idleness admidst a plethora of plenty is nevertheless a sight not unlikely to incite some eventual inquiry and initiative. With the findings of its own special and appropriately named Pitcher Committee before it and the embattled cries of numerous dairy farmers ringing in its ears, the Legislature of New York was moved in April 1933 to declare as a Legislative finding "That the present acute economic emergency, being in part the consequence of a severe and increasing disparity between the prices of milk and other commodities, which disparity has largely destroyed the purchasing power of milk producers for industrial products, has broken down the orderly production and marketing of milk and has seriously impaired the agricultural assets supporting the credit structure of the State." (Laws of 1933, Ch. 158).

Of course, the Legislature, while finding the emergency, might have found that a disparity not altogether dissimilar likewise existed between other parts of the economic structure which largely destroyed the purchasing power of industrial producers for milk products. But it did notand the question is whether there was in its power the discretion necessary to its particular choice. The choice being made, the Legislature stated: "That in order to protect the well being of our citizens and promote the public welfare, and in order to preserve the strength and vigor of the race, the production, transportation, manufacture, storage, distribution and sale of milk in the State of New York is hereby declared to be a business affecting the public health and interest. That the production and distribution of milk is a paramount industry upon which the prosperity of the state in large measure depends." Forthwith, there was constituted, Chapter 158, Art. 25, Agricultural and MarketsLaw, a Milk Control Board of three members whose powers, practically, are only limited by the extent of the milkbusiness and the temporary character of the Legislation. The life of the Board expires March 31,1934. Until then, it shall fix by order the minimum and maximum wholesale and retail prices for milk handled within the State, and, in consonance with the Legislative intent (§312, subdiv. c, d, Agricultural and Markets Law), may fix the minimum price to be paid by milk dealers to producers (farmers). Violation of the order of the Board is made a misdemeanor punishable accordingly. When a retail dealer concededly violated this law by selling milk under the minimum fixed price, his conviction was upheld in People v. Nebbia, (262 N.Y. 259). It was upheld over the urgent plea of the defendant that thereby were trodden upon the rights guaranteed to him by the Constitution of the United States, Fourteenth Amendment, §1, and the Constitution of the State of New York, Art. 1, §6, that neither he nor any person shall be deprived of life, liberty, or property without due process of law. Involved inextricably, therefore, in this conviction is the present judicial concept of what Chief Judge Pound named the progressive science of constitutional law. (pg. 270). Practically, if not judicially, there may also be involved the discovery that volatility more than flexibility is the chief constitutional virtue.

POLICE POWER

Amongst the powers which were reserved in the respective states and in respect of the limitation of which the Federal Constitution is silent is what is denominated the "Police Power" of the state. To the broadest extent of the concept this power is reserved in the State; and the discretion which governs its exercise is not a subject for national supervision. (South Carolina v. United States, 199 U.S. 437).

"There is a power beneath the Constitution but not superior to it, unwritten, not fully defined, necessary, resting on the sovereignty of the state which exists because the state cannot exist without it and which must be considered in connection with the Constitution. That power, known as the police power, aims to promote the public welfare by compulsion and restraint, and it is under the exclusive control of the legislature. The executive department can exert it only as authorized by the legislature. The courts can neither exercise it, nor prevent its exercise, but they can determine whether a statute is a constitutional use of the power." (Wright v. Hart, 182 N.Y. 330, 352, Vann, J., dissenting).

"The police power is, of course, one of the necessary attributes of civilized government. In its most comprehensive sense it embraces the whole system by which the state seeks to preserve the public order, to prevent offenses against the law, to insure to citizens in their intercourse with each other the enjoyment of their own so far as is reasonably consistent with a like enjoyment of rights by others. Under it, persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the state. But it is a power which is always subject to the Constitution for in a Constitutional government limitation is the abiding principle, exhibited in its highest form in the Constitution as the deliberative judgment of the people, which moderates every claim of right and controls every use of power." (Ives v. South Buffalo Railway Company, 201 N.Y. 271, 300).

So necessary is the police power to our triad system of government that in one sense it may well be said that the "raison d'etre" of the Legislature is the necessity for its exercise. And its exercise may not be confused with the executive power and the duty of its enforcement. Neither may the prior bounds with which the Legislature has voluntarily encircled itself be deemed in any proper sense a real construction of the boundaries beyond which it will not pass. "Readily repelled is the intimation that the inactivity of a power, however prolonged, militates against its legality when exercised" (German Alliance Ins. Co. v. Kansas, 233 U.S. 389, citing, U.S. v. D. & H., 213 U.S. 366). Whether the courts to whom is reserved the right and necessity to conceive and construe will then decide that boundary and constitutional limitation have coincided is another matter; just as it is always a question whether the previous taxing of an arm of power has proved the scope of its potency.

Right and obligation are correlative. They are the concomitants of organized society which is nothing other than a collection of rights for their own protection and preservation. As they are to

saved, so must there be a controlling, regulating authority, supervising and maintaining, always theoretically for the greatest good, the relations of individuals to the state and to each other. Neither absolute nor uncontrollable is the right to liberty and property. Qualification is inherent in the bill of rights and deprivation of personal rights in the interests of the public good can nevertheless be due process of law. (Bertholf v. O'Reilly, 74 N.Y. 509).

Thus it is that the police powers embrace the powers of government to preserve and promote the public welfare, the health, the morals, the peace and safety of society. (Slaughter House Cases, 16 Wall.(83 U.S.) 36). It is an attribute of the sovereignty. (White Co. v. Louisville & N.R.Co., 340 Ill. 42). Embraced within it, and following as corollary to it are, as well, regulations designed to promote the public convenience or the general prosperity. (Chicago B. & Q. Railway Co., v. Illinois, 200 U.S. 561). That it has a substantial relation to a police purpose (Lockner v. New York, 198 U.S. 45), that it is a reasonable adjunct to the composite scheme and purpose of the ordinance (Nectow v. Cambridge, 277 U.S.183). and that, discriminating against no one it operates alike upen to all the persons under the conditions now controlled (Barbier v. Connolly, 113 U.S. 27), these are the lines of the police power,

In the extension of these lines, they veer in definite directions. The public health demanded vaccination to prevent small pox in State ex. rel. Milhoof v. Board of Education, (76 Ohio St.,717); was important enough to prohibit the sale of cigarettes, (People ex. rel. Berligheimer v. Busse, 231 Ill. 251), and to require that within a certain area cattle for slaughter be brought to the yards of a single corporation. (Slaughter House Cases, supra). It justifies the inhibition of opium and its derivatives. (U.S. v. Doremus, 249 U.S.86). A determination that public morals require the regulation and control of liquor, its manufacture and distilling, (Dobbins v. U.S.,96U.S.395), and its traffic and sale, (Bertholf v. O'Reilly, supra; South Carolina v. U.S., supra) is a valid interpretation by the Legislature of the supervisory duty vested in it.

Equally exacting are the needs of the peace and public safety. A dangerous quantity of gun powder or inflammable oils in a city is not irremedial (Para Oil Corporation v. City of Hope, 248 U.S. 498); hours of labor may not encroach upon the health and safety of the laborer as to be oppressive and dangerous and yet be beyond repair. (Muller v. Oregon, 208 U.S. 412), although that is not to say that the hours rather than their number may be specified. (People v. Williams, 189 N.Y. 131). The enhancement of the social welfare was justification for the astonishing encroachment upon private right when sterilization was held not dissociated from the need of the State for mentally sound offspring. (Buck v. Bell, 274 U.S. 200). The height of tenements (People v. D'Oench, 111 N.Y. 359), the strength of walls and that their interior should be covered according to the requirements of the fire department (Fire Dept. v. Atlas Steamship Co., 106 N.Y. 566), the ordinances for zoning of buildings (Euclid v. Amblker Realty Co., 272 U.S. 365), have a relation to the public safety and welfare and are subject to the policing of the State and its subordinate delegates.

The bill of rights is not an absolute and incontrollable franchise (as stated before, Bertholf v, O'Reilly, supra). Is efficacy is relative, not absolute; its guaranty fundamental and paramount but not universal and unbridled. Therefore it is not without legality that the sovereign, in the exercise of its sovereignty, disturbs the freedom of contract in fixing a price that shall be charged for the storage of grain (Munn v. Illinois, 94 U.S. 113); by prohibition of options to buy or sell grain at a future time. (Booth v. Illinois, 184 U.S. 425); in the annulment of all contracts for the sale of corporate stocks for future delivery or on margin (Otis v. Parker, 187 U.S. 606). It unlawfully interferes with the use of property when it limits the height of buildings (People v. D'Oench, 111 N.Y. 359), and requires that tenement houses be furnished with water (Health Dept. v. Rector, etc., 145 N.Y. 32). So, too, it enters in the domain of personal liberty to regulate barbering on Sunday (People v. Hanover, 149 N.Y. 195; Petit v. Minnesota, 177 U.S. 164); to exclude from school children not vaccinated (Matter of Viemeister, 179 N.Y. 235) and then to compel vaccination (Jackson v. Mass., 197 U.S. 11). Of similar nature are hours of labor laws (Muller v. Oregon, supra) and the requirement and prescription of qualifications as to character and learning for the practise of the professions. (Dent v. West Virginia, 129 U.S. 114; Watson v. Maryland, 218 U.S. 173).

Perhaps constitutionally paramount is the facet of the power which gleams on private business. Outstanding of the features of the police power is that its operation is damnum absque injuria, (Tenement House Dept. v. Moechem, 179 N.Y. 235). Regulatory in its operation, it may not however, become confiscatory. Confiscatory it concededly is when it attempts to transfer a business from the essential privacy of its nature to the sinecure of legislative control. Then it is that there has been deprivation and not due process. The line of distinction rests upon the phrase "affected with the public interest."

PUBLIC INTEREST

This expression, as much a part of the Fourteenth Amendment as if expressly written therein, first was used in the manuscript of Lord Hale "De Portibus Maris". (Harg. Law Tracts 78) when he discussed the three-fold rights of the proprietor, the public and the king in respect of wharfage. Acknowledging that a man may set up a port for his private advantage, taking what rates he and his customers can agree upon, nevertheless it is said that if the king or the subject have a public wharf to which all persons must come because there is no other wharf in that port or the port is new, arbitrary and excessive charges cannot be made. For "it is then affected with a public interest and ceases to be jus privati only". When the State of Illinois was challenged the right to control the rates of storage in grain elevqtors the Supreme Court of the United States in a momentous adaption of Lord Hale's language declared that "When one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the

use he must submit to the control". (Munn v. Illinois, 1876, 94 U.S. 113). Apropos are other declarations: "The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation", (People v. Budd, 117 N.Y. 1,27; Aff'd., 143 U.S. 517).

"A business is not affected with a public interest merely because the public are warranted in having a feeling of concern in respect of its maintenance. Nor is the interest such as arises from the mere fact that the public derives benefit, accommodation, ease or enjoyment from the existence or operation of the business; and while the word has not always been limited narrowly as strictly denoting a 'right', that synonym more nearly than any other expresses the sense in which it is to be understood". (Tyson v. Banton, 273 U.S. 418).

In a real sense the appellation "public interest" is as unfortunate as it is legally euphonious. It is unfortunate because in the single conception of the principle which it illustrates are discovered the reasons for the regulation and the denial of the power. "In some degree the public interest is concerned in every transaction between men, the sum of transactions constituting the activities of life. But there is something more special then this, something of more definite consequence, which make the public interest that justifies regulatory legislation (giving examples of public utilities)". (German Alliance Ins. Co. v. Kansas, 233 U.S. 389, valid rate regulation of the business insurance). No one denies that a creditor has regard for the business of his debtor, however individual and essentially private that business is. Business is but an adjustment of debts and credits. Interdependent and impossible of separate existence the collective credit and composite debt must somewhere strike a balance. This balance may be too high or too low, it should fluctuate but sometimes it will not. Its stability depends upon its fluency; when it becomes static the result is depression. The public has an interest in all this. Its well being is dependant upon it. Each private business, however small, has its individual creditors and is an integral part of the whole. Collectively they are the public, but that is not what is meant by the word "public" when used in the interpretive sense here considered. In the abstract, all these creditors have a common denominator; in the concrete their interests are personal and private, divorced and distinct from the interests of their fellows, or even opposed to them. Not so when speaking of businesses "affected with the public interest". It is the "public" which has changed with the transition of the concept. All are now on equal footing. No longer is the interest a public one merely becuase the number of individual interests has become a numerical public. The public interest is now understood as involving primarily the whole of society, and incidentally its members; and the importance of the concern in the business varies not one whit as its effect is gauged upon the different individual members. An example may illustrate the principle. A man in New York lends money to a butcher. A man in Chicago lends the money to the baker. Primarily they are only interested in the individual businesses; secondarily they are both concerned with the success of both private enterprises. But both are primarily concerned with the problem of transportation

and the New York man is no more interested in the rate to Chicago than is the Chicago man in the rate to New York. It follows, therefore, that the characteristic of the public business is the dominating public welfare that indifferently is attached to the nature of certain businesses.

They have been divided into three great classes. Within the first fall the public utilities and common carriers, the respective engagements of which are with the authority of the public grant and are imposed with the affirmative duty, express or implied, of rendering a public service demanded by any member of the public. In the second class are those occupations, in our heritage of the common law regarded as exceptional and needful of regulations in the interests of the public. Such occupations are those of the keepers of inns, cabs and grist mills. Finally there are those businesses incipiently private but progressively public because of the peculiar relation to the public which they come to hold. (Wolff Packing Co. v. Industrial Court, 262 U.S. 522, and cases therein cited). In respect of the latter businesses it is as if transcending the strictly private field they suddenly become overlords only to discover that they have passed from independence to servitude under the sovereign public control. This is the class in which we are concerned. Its members are ever increasing. Who will be the next rests with the legislature and the court. Dictum gives way to exigency, and as exigencies multiply the unnecessary word is apt to be unspoken. Yet "it has never been supposed since the adoption of the Constitution that the business of the butcher or the baker, the tailor, the wood chopper *** that price of his product or his wages could be fixed by state regulation ** One does not devote one's property or business to public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which the above mentioned are instances. (Wolff Packing Co. v. Industrial Court, supra). That was a case which involved the constitutionality of a statute of Kansas. In the interests of reasonable continuity and efficiency of the certain industries, among others that of the manufacturers and preparers of food for human consumption, which interests were stated to be necessary for the public peace, health and general welfare, the Industrial Board was empowered to legislate the terms and conditions between disputing employer and employee. The employer was bound to pay the wages then fixed and the employee, though not compelled then to work, was yet forbidden to strike. It did not decide (pg. 539) whether the preparation of food should be classed as a quasi public business. Most recently, and the recent is of peculiar importance in this subject, the court said: "Here we are dealing with an ordinary business (ice), not with a paramount industry upon which the prosperity of the state im large measure depends. . It is a business as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor, each of whom performs a service which to a greater or less extent, the community is interested in having maintained; but which bears no such relation to the public as to warrant its inclusion in the category of businesses charged with the public use." (New State Ice Co. v. Liebmann, 285 U.S. 262). This involved the enforceability of an Oklahoma statute which declared the manufacture, sale and distribution of ice a public business; required as a condition precedent for the

exercise of such business a license for that purpose; forbade the issuance of a license by the commission to the applicant except upon proof of the necessity for a supply at the place proposed; and authorized a denial of the application where the existing licensed facilities "are sufficient to meet the public needs therein". Particular regard will be extended these two decisions. One other case also deserving of notice is Block v. Hirsh, (256 U.S.,135), wherein the purchaser of a building tried to oust a prior lessee upon the expiration of his term, and was successfully resisted on the authority of the District of Columbia Rents Act the provisions of which, effective only two years, were stated to have been made necessary by the emergencies growing out of the war. Such emergencies resulted in rental conditions in the District dangerous to public health and of embarrassment to the transaction of business of the Federal Government.

THE CASE

With this brief backdrop we may now analyze the principles which govern the case at hand, i.e., People v. Nebbia. First of all, "A declaration by a legislature concerning public conditions that by necessity and duty it must know, is entitled at least to great respect." (Block v. Hirsh, supra). That here it had its entitled respect is indisputable. The legislative declaration is not conclusive. (Wolff Packing Co. v. Board, supra; Block v. Hirsh, supra), and "The state of circumstances must exist to justify the legislation; though if it could exist then presumably it did and the power to legislate is there." (Munn v. Illinois, supra, pg. 132). Whether or not the business has changed into a public one is always a subject of judicial inquiry (Wolff Packing Co. v. Board, supra), and "A limit in time, to tide over a passing trouble well may justify a law that could not be upheld as a permanent change". (Block v. Hirsh, supra). Exigency and emergency pervade the judgment of the court in this case. Perhaps the fundamental obstacle to decision by such considerations is that it finally resolves upon the court to determine when is legislation temporary and not permanent, providing some length, be it two or twenty years, is fixed; when does an emergency exist, and when does it not. Extremes may be supposed where resolution of the doubt is a matter of course. Such is not the question. From all the cases it may safely be said that existence of the condition is precedent to any power in the Legislature to control it. Whether there is any such existence is concededly subject to judicial review, as to whether, if existing, it may be controlled. But whether or not, the power being there, the Legislature may choose to control is solely for that body to determine, as also are its methods. (Cases supra).

Here, however, there is the anomaly that unless there be an emergency there can be no necessity for Legislative control and the court, not the Legislature, decides whether the emergency is present. There is then no presumption as in Munn v. Illinois, supra, if the circumstances could exist that then they did and with them as the power to legislate. Preferably it should be "A publicly notorious and almost world wide fact" (Block v. Hirsh) that emergency itself has converted a private business into a public one.

One important distinction in the businesses is apparent in the excerpt above from New State Ice Co. v. Liebmann, where the court stated it then was "not dealing with a paramount industry upon which the prosperity of the state in large measure depends." The negation was not idle. It was the result of a thorough consideration of the underlying reasons for holding a cotton gin affected with the public interest. (Frost v. Corporation Commission, 278 U.S. 515). Prosperity here meant necessity and solvency. It was by reason of the necessity for ginning cotton and the fact that predominantly the public grew cotton and depended on the gin in the production of the finished product that the gin like the grain elevator was affected with the public interest. In the one case the gin was required to realize upon the product essentially incomplete until ginned; in the other, central storage was an essential part of production. Raising cotton was the paramount industry; raising grapefruit was not, if indeed there was any. It was monopoly and extortion that was aimed against. When, therefore, difference is seen between milk as a paramount industry and ice as one not such, due weight does not seem to be given to another part of the same opinion which is indicative that the meaning which the court attached to the word "paramount", was in the usual monopolistic sense. The court said that since one may, for a comparatively moderate outlay, have set up in his kitchen an ice making machine of his own "it will hardly do to say that people generally are at the mercy of the manufacturer, seller and distributor of ice for ordinary needs." Here it is stated that "the production of milk on account of its great importance as human food, is a chief industry of the State of New York *** and that the entire milk product cannot be sold locally "but must be sold to milk gatherers to be shipped to centers of population". Clearly, a central storage plant could be compelled to charge reasonable rates. But that is because such centers would then partake of the nature of monopolies.

Probably the one inevitable result of a business "affected with the public interest" is its inevitable mantle of monopolism. Thereupon extortion follows uncontrol. Underneath and omnipresent in all the decisions upon the subject is the consideration of parity between the business and those dealing with it. When the business becomes dictatorial then the state will strike the parity. But that is not to say that it will be struck to make the business dictatorial and monopolistic.

In Wolff Packing Co. v. Court, supra, it was said that regulation of the preparation of food has been with a view to the health of the public. "But never has regulation of food preparation been extended to fixing wages or the prices to the public, as in the cases cited above where fear of monopoly prompted and was held to justify regulation of rates. There is no monopoly in the preparation of foods **** ." Speaking, in New State Ice Co. v. Liebmann, of the rquirement of a certificate of necessity, it was concluded, incidentally, that "the practical tendency of the restriction *** is to shut out new enterprises and foster monopoly in the hands of the existing establishments against rather than in aid of, the interest of the consuming public." The test of the business has always been its effect upon the payor and not on the payee. When rates have been fixed it has been to save the payor from extortion. Limitation there has been on such fixation that in the interests of the public the business yet may not be deprived of a fair return.

The power comes first and the limitation follows as an incident. Till now that power has been used to limit income, not to produce the income by compelling a price on a product deemed indispensable and ever in demand.

The situation here is not one of natural or artificial monoply. Extortion there is none, or at least none as yet. Competition has driven the price down and the legislature means to raise it; more, it has ordained a rise. Indisputable it is that, as with other commodities, the public health may be protected and the public be saved from fraud under the regulatory operation of the police power upon the production, distribution and sale of milk. (Polinsky v. People, 73 N.Y. 65; Fischer v. St.Louis, 194 U.S. 361; People ex.rel. Liebermann v. Van DeCarr, 199 U.S. 552). It may even be conceded that as in the case of housing Block v. Hirsh, supra, a situation might well arise where due to unprecedented conditions and upheavals the supply of milk was in the control of a few who could and did dictate the price. Let the price then be fixed by sovereign fiat and the business be declared temporarily to be charged with the public interest. Still that is not this case. Health could be and has been protected by adequate provision, or it can be. Here health has been declared to be dependent upon obtaining the milk. Milk must be had; the public health demands it. To insure the supply, the producer is guaranteed a reasonable, which is to say a profitable, return. Health, not price, is made more important to the consumer; and the Milk Board fixes the price of his health. Obviously the primary object is to induce the producer to continue to produce. Consider now the converse. With every benefit goes hand in hand a burden; alongside, right, is obligation. If public health is so a part of the milk supply that the public may be compelled to maintain by reasonable price the production of the supply, then with such reasonable return the producer may be compelled to continue his production. The conclusion is inescapable. The demand of the public health does not end with the accomplishment of a fair return. If "it is of such paramount importance as to justify the assertion that the general welfare and prosperity of the State in a very large and real sense depend upon it," (Pound, Ch. J., pg. 266), then so does the state depend upon its continuance. It is indecisive to say that undoubtedly it will continue. If necessity gives the power to compel a reasonable return; it health, and general welfare, can not exist without it, then, in a given case, production may be commanded that health may be preserved. The producer then may be compelled to work, to become the public slave. Sight is not lost of the possible power of the State to confiscate through paramount need of self preservation, as in war or famine, the whole of any business. If it can do what is attempted here, then, seemingly, confiscation or usurpation will always be unnecessary.

There is yet another consideration. No less inescapable is the conclusion that as an incident to such power the State, in the interests of the consumer, might limit the number of producers so that fixing the price would not result in a number of consumers supporting a larger number of producers. If the public must support the producers, certainly, under any rule of law, it need not support a number more than is adequate to supply its demands. Otherwise, and such is not impossible here, a premium is placed on the business of producing and with the acquisition of such business the State,

by its Milk Board, assures to the newcomer a reasonable profit. Too many producers here resulted in a price too low. It is insensible to suppose that because the price is raised there will not still be too many. If anything at all, there will be more. It must therefore be that inhering as a lesser in a greater power the state may require a certificate of necessity. Aside from the tendency then to foster monopoly, the existence of such a power in any state has been negatived by the Supreme Court in New State Ice Co. v. Liebmann, supra, which in condemning the requirement of a certificate of necessity, declared that "There is no difference in principle between this case and the attempt of a dairyman under state authority to prevent another from keeping cows and selling milk on the ground that there are enough dairymen in the business."

Justice Holmes believed (Tyson v. Banton, dissenting) "The motion that a business is clothed with a public interest and has been devoted to the public use is little more than a fiction intended to beautify what is disagreeable to the sufferers. The truth seems to me to be that, subject to compensation when compensation is due, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it."

Perhaps now that is so. But at least until now neither it nor the decision in question has been the law. If the Constitution has any efficacy neither has become so.

Eugene V. Coffey

EQUITY - MARSHALING OF ASSETS AND SECURITIES

In its recent decision in Andes Co-operative Dairy Co. v. Baldwin, 238 A.D. 726, the Appellate Division has again considered the equitable doctrine of marshaling of assets. Justice Bliss, in expressing the opinion of the court, says, "A secured creditor has the right to prove and receive a dividend upon the full amount of the debt without being compelled to deduct from the amount of the proved debts, the value of collateral securities, or of any proceeds thereof". Justice Crapser, in his dissenting opinion, says, "It has always been the law of this state that where a creditor has a lien upon two funds for the security of his debt, and another party has an interest in only one of these funds, without any right to resort to the other, equity will compel the creditor to take his satisfaction out of the fund upon which he alone has an interest, so that both parties may, if possible, escape without injury", Justice Crapser states the doctrine, and seeks to apply it to this case. The court, in the above quoted statement, refuses to discuss or apply it to the case.

The facts of the case present a situation where the doctrine of marshaling of assets, if accepted without any qualification, should determine the decision of the court. The Fort Schuyler Farms, Inc., a domestic corporation, was engaged in the business of operating several milk-collecting stations in this state. It had furnished the state with its bond conditioned for the prompt payment of all amounts due to producers for milk or cream sold to it by them. In December 1931 it rented the plant or station owned by the Andes Co-operative Dairy Company at Andes, N.Y., and there received milk produced in the neighborhood from producers who were mostly members of the Andes Dairy Company. In June 1932, the producers at Andes procured the Fort Schuyler Farms, Inc., to deposit with certain trustees $15,000 par value of bonds of the Meadow Sweet Farms, Inc., as security (first) for the payment of milk theretofore delivered at the Andes plant and (second) for the current and past due rent of the Andes plant. On August 24th, 1932, the FortSchuyler Farms, Inc., was adjudged bankrupt. The bankrupt owed the milk producers of the Andes group $16,623. It also owed the Andes Dairy Company, $3,539 for rent. The total amount of its debts was about $43,854 claimed by milk-producers who had sold to it milk and cream. In his determination of the distribution of the assets of the bankrupt corporation, the commissioner of agriculture concluded, in effect, that the Andes Dairy Company should deduct from the amount of its claim the value of the $15,000 bonds held by the trustees. Thus the question is whether the Andes producers may share with the other producers according to the full amount of their claim, or must first deduct from their claim the value of the bonds held by the trustees as security, or any proceeds thereof.

It will be observed from these facts that the producers of the Andes Dairy Company and the company itself had two funds to which to resort in payment of the debt owned by the Fort Schuyler Farms, Inc., viz., the assets, or estate, of the bankrupt corporation, and the Meadow Sweet Farms, Inc., bonds which were pledged as security. The market value of these bonds have not been definitely ascertained.

They have not been liquidated. The other creditors of the Schuyler Farms, Inc., have only one fund against which they can assert their claim, the assets of the bankrupt corporation which are in the hands of the commissioner. Should, for fairness and practicality, the Andes creditors deduct the amount of their security from their debt; or should they be allowed to receive dividends on the full amount of their debt?

The doctrine of marshaling of assets and securities is that, where a creditor has a lien on two funds in the hands of the same debtor, and another creditor has a lien on one of them only, equity will compel the former to make his debt out of that fund to which the latter cannot resort. 5 Pomeroy's Equity Jurisprudence, §2288-§2293, §1414; Cheeseborough v. Millard, 1 Johns. Ch. 109; Farmers L. & T. Co., v. Kip, 192 N.Y. 266,283; Ingalls v. Morgan, 10 N.Y. 178; Butts v. Carey, 143 A.D. 356; Breed v. Auburn Nat. Bank, 57 A.D. 630; Oppenheimer v. Walker, 3 Hun 30; Herriman v. Skillman, 33 Barb. 378; Mechanics Bank v. Edwards, 1 Barb. 271; McConnell v. Muldoon, 24 N.Y.Supp. 902; Nat. State Bank v. Hibbard, 45 How.Pr. 280; Geller v. Hoyt, 7 How. Pr. 265; Reynolds v. Tooker, 18 Wend 591; Evertson v. Booth, 19 Johns 486; Dorr v. Shaw, 4 Johns.Ch.17; Dwelle-Kaiser Co. v. Moon, 140 Misc. 475; In re Fargo v. Squires, 154 N.Y. 250; (where the court applies the rule to a distribution of property under a will); Cowdry v. Carpenter, 1 Abb.Dec. 445; Besley v. Lawrence, II Paige 581; Wattengel v. Schultz, 11 Misc. 165; Aldrich v. Cooper, 1802, 8 Ves. Jun. 382, 32 Reprint 402, 18 E.C.R. 198).

The principle has long been recognized by the courts of this State and of others. The leading case on the subject, and the one to which the origin of the doctrine has often been attributed, is Aldrich v. Cooper (1802), supra. Lord Eldon, in applying the doctrine to the case, says, "The principle is, in some degree, that it shall not depend upon the will of one creditor to disappoint another. It is the ordinary case to say a person having two funds shall not, by his election, disappoint the party having only one fund; and equity, to satisfy both, will throw him who has the two funds upon that which can be affected by him only; to the intent that the only fund to which the other has access may remain clear to him". He points out that it is the intention of the debtor (or testator) that both creditors should be satisfied; and it would be against the principles of equity and justice to permit the creditor who has the lien on the two funds to defeat that intention. In Ingalls v. Morgan (1854),10 N.Y. 178, the Court of Appeals said, "This is a case where the creditor has a lien upon two funds for the security of his debt, and another party has an interest in only one of these funds without resort to the other - and equity will compel the creditor to take his satisfaction out of the fund upon which he alone has an interest, so that both parties may escape without injury". It is an old equitable doctrine founded in natural justice and recognized in every enlightened system of jurisprudence, governed entirely by the principles of equity and well recognized in this country. (Cheeseborough v. Millard, 1 Johns. Ch. 409). It is not a vested right, or lien founded on contract, but "rests upon equitable principles called into action by the benevolence of the court" (Farmers L. & T. Co. v. Kip, 192 N.Y. 266, 283.

To invoke the application of the doctrine, it must appear that the two parties are creditors of the same debtor. (Jenkins v. Smith, 21 Misc. 750) where it was held that the holder of an indorsed note secured by a mortgage, the maker of which was insolvent, should not be compelled to proceed against the indorser who was a different debtor; that there are two funds belonging to that debtor; and that one of the creditors alone has the right to resort to both funds. Since the right is purely equitable, it applies only when it can be done with justice to the creditor and his debtor, and without prejudice to third persons.

The court has specificly refused to apply doctrine where there were not the necessary two funds. In Willard v. City of N.Y.,(18 Misc. 165), the bank held certain promisory notes of a contractor who had assigned to it, as collateral, moneys to become due under his contract with the city. It was claimed that the doctrine applied because the bank had two funds, the assignment of the moneys to be earned and the promisory note, upon which it could satisfy its debt. The court held that since the assignment was taken for the specific purpose of securing the payment notes under an agreement that on default the bank was simply to pay itself and return the notes to the contractor, there was but one fund applicable to the payment of the debt, and the doctrine did not apply. It is necessary too, that both the funds be in the hands of the common debtor of both creditors. (Cont. Ins. Co. v. Reeves, 149 A.D. 835; Jenkins v. Smith, supra, Reynolds v. Tooker, 18 Wend. 591; Dorr v.Shaw, 4 Johns. Ch. 17).

Although, perhaps, we find the doctine most frequently applied to controversies between mortgagees - eg., where a mortgagee holds a prior mortgage on two parcels of land, and a subsequent mortgage on but one of the parcels is given to another (this sometimes gives rise to the application of equity to subject the property in the inverse order of alienation, but this is distinguished from the equity of marshaling of assets, as pointed out in Newly v. Fox, (90 Kan.317; 47 L.R.A. 302) - its operation is not affected by the nature of the property which constitutes the double fund, but applies whenever a paramount creditor holds collateral security, or can resort to other real or personal property for the satisfaction of his debt. (Ingalls v. Morgan, 10 N.Y. 178; Wattengal. v. Schultz, 11 Misc. 165; Besley v. Lawrence, II Paige 581; Geller v. Hoyt, 7 How.Pr. 265; McConnell v. Muldoon, 24 N.Y.Supp. 902; Breed v. Auburn Nat. Bank, 57 A.D.468). Nor is it necessary that the property be in the hands of the original debtor. The right is enforceable against a person to whom the property of the common debtor has descended, or against the assignee or trustee of the common debtor. (Aguilar v. Aguilar, 1820, 5 Madd 414, 56 Reprint 953; Besley v. Lawrence, II Paige 581; Dwelle-Kaiser Co. v. Moon, 140 Misc. 475).

When the facts of the case present a situation where there are two creditors (or more), and there are two funds in the hands of the common debtor, and one creditor has access to one of the funds against which the other creditors have no right to resort, the courts are fairly consistent in applying the doctrine, The confusion and conflicting cases become more apparent where the situation is complicated by circumstances which would make it inequitable to apply the doctrine. "These rules must be taken with the modification and

and exceptions that in their application the paramount incumbrancer shall not be delayed or inconvenienced in the collection of his debt, for it would be unreasonable that he should suffer because some else has taken imperfect security." (4 Pomeroy Equity Jurisprudence, §1414). In Jenkins v. Smith, (21 Misc. 750), the court said: "The remedy proceeds, not upon a legal right, but upon a principle of equity; and consequently, if under the circumstances of the case its enforcement will be inequitable, it will be withheld." It would appear that the New York courts have tenaciously preserved this qualification, and have almost stubbornly refused to apply the doctrine where the evidence tends to show that it would in any way be unjust to the creditor who has the lien on two funds.

The case cited most frequently in support of the policy in this state is People v. Remington, (121 N.Y. 328). In that case the defendant corporation had been dissolved on the ground of insolvency. A receiver had been appointed. The Ilion National Bank was a creditor of the insolvent corporation, and had received pledges of security and property. It made proof of its full claim against the corporation, and the receivers claimed that it should deduct the amount of its securities from this claim. The court refused to apply the doctrine, saying, "The doctrine of marshaling of assets and securities will not be enforced if it will in the least impair the prior creditor's right to raise his debt out of both funds". In Breed v. Auburn National Bank (57 A.D. 468) the defendant held a mortgage and other securities as collateral for its debt. The court applied the doctrine; but said that if the defendant could show that the other securities were not of sufficient value to liquidate such indebtedness, it would not be subject to enforcement of the doctrine. In Herriman v. Skillman, (33 Barb. 378), action was brought to foreclose a mortgage on certain lands. The plaintiff held other securities giving him a lien on the mortgagor's personal property. The court refused to apply the doctrine because there was reason to think that both the real and personal property subject to the plaintiff's lien would, if brought to sale, be insufficient to pay the debt. Thus the court will not apply the rule where it appears that, to do so, would deprive any secured creditor of the benefit of his security so far as it may be necessary for his protection; as where the funds are insufficient to satisfy the creditor's claim, (Reynolds v. Tooker, 18 Wend. 59; Evertson v. Booth, 19 Johns. 486; Jenkins v. Smith, supra; Jervis v. Smith, 7 Abb. Pr. (N.S.) 217; N.Y. Co-operative Building Assn. v. Brennan, 62 A.D. 610). In the last case the court said; "Circumstances alone that the plaintiff has two securities, upon only one of which the defendant has a lien, is not sufficient to give her an absolute right to compel the plaintiff to resort primarily to the security upon which she had no lien"; but that the burden was on her to allege and prove that the plaintiff would not be injured by resorting to that fund and that such fund was sufficient to satisfy the indebtedness of the plaintiff. Nor will the doctrine be applied where it will delay or inconvience the double creditor. (James v. Hubbard, 1 Paige 228; Woolcock v. Hart, 1 Paige 185; King v. McVicker, 3 Sandf. Ch. 210).

There is apparently only one New York case which is in conflict with the above-stated policy in this state. This is Besley v. Lawrence, (II Paige 581) where a bank held the note of one Hasbrook who had assigned to his surities on the note a bond and mortgage on the condition that they should pay the note. On the same day he assigned certain other property to trustees for the benefit of creditors, to sell it and apply the proceeds to the payment of the note and the residue to certain other creditors. It was claimed that the note should be paid out of the property assigned so as to give the plaintiff's, who were judgment creditors, the benefit of the bond and mortgage. The court held that such a contention was untenable; but that the doctrine of marshaling of securities applied; thereby, in effect, holding that the sureties on the note would not be allowed to claim the full amount of their indebtedness against the property assigned by the maker for the benefit of creditors. However, there was no express finding to the effect that the mortgaged property was insufficient to satisfy the debt.

From a consideration of the cases concerning the origin and development of the doctrine of marshaling of assets and securities, it would appear that the rule laid down in Andes Co-operative Dairy Co. v. Baldwin - viz., that a secured creditor has the right to prove and receive a dividend upon the full amount of the debt without being compelled to deduct therefrom the value of collateral securities, or any proceeds thereof - is based upon the fundamental principle that where the creditor will be inconvenienced or delayed, or where it would be inequitable to him, the doctrine will not be applied; that, because it is an equitable rule, it cannot be invoked where it will work an unfair or unjust result. If this is not true, the rule that the creditor does not have to resort to his collateral but may receive a dividend on the full amount of his claim, arbitrarily applied, ignores completely the doctrine which the courts have heretofore recognized and applied.

It might be noted at this point that many states have expressly embodied in their statutes the rule that the secured creditor must deduct from the amount of his debt the value of his securities, regardless of the value of such securities. California, Connecticut, Indiana, Kentucky, New Hampshire, Rhode Island, Texas, Vermont, and England have bankruptcy or insolvency laws to this effect. (1918 B L.R.A. 1013). New York has no such statute. Georgia had no such statute in 1917 when, in the Citizens' & Southern Bank v. Alexander (92 S.E. 868), the court held that the creditor of an insolvent bank who held collateral security for a portion of the debt was not entitled to a dividend upon the entire indebtedness due, as though he had no collateral. But it determined that such secured creditor must first apply the amount realized from the collateral to reduce the indebtedness, and was entitled to dividends only upon the unpaid balance. To hold otherwise "would give to the one who held both secured and unsecured claims an unjust advantage or preference over one who held only an unsecured claim, which was not intended by the parties". However this would seem to violate the modification to the doctrine that it will not be applied where the paramount creditor will be delayed, inconvenienced, or prejudiced.

In Merrill v. National Bank (173 U.S. 131) the question of whether the creditor should first be compelled to deduct the amount of his security from his debt before a dividend could be declared was discussed to a considerable length. The court recognized the different practices and policies of the various states and courts, and adopted the rule which allows the creditor to retain his security and participate equally with the general creditors upon the amount of his debt as of the time of the adjudication in insolvency. This is the rule which the New York courts have applied. It is the rule which the Georgia court rejected.

This rule would appear to be the better rule, because it is based upon equitable principles upon which the doctrine of marshaling assets and securities is founded. It does not brush aside or attempt to nullify the doctrine; but is a part of the doctrine itself, because in such cases where it is applied the security held by the creditor is not sufficient to satisfy his debt, and also, compelling him to resort to it, would in almost all cases seriously delay and inconvenience him. A further reason for this rule is that the debt or obligation of the debtor is the principle thing, the pledge or collateral being a mere incident; that the collateral is a guaranty of performance of the principle obligation, and that the creditor always has the right to proceed against the debtor without first being compelled to resort to his collateral; and that the nature of this contract between debtor and creditor is not changed in the case of insolvency; and therefore the creditor should be allowed to proceed upon the full indebtedness, or the full amount of the debtor's obligation. (People v. Remington, 121 N.Y. 238; Jervis v. Smith, 7 Abb.Pr. (N.S. 217). This may be true as between the debtor and creditor; but, as has been pointed out, under the proper circumstances, equity will grant relief to certain other creditors under the doctrine of marshaling of assets and securities. Although such relief will not be granted where the facts give rise to the modification or qualification (as was clearly the case in Jervis v. Smith, supra, where the secured funds were insufficient to satisfy the indebtedness; and in People v. Remington, supra, although such situation was not so clearly presented by the court), it should not be forgotten, nor should the fact be ignored, that the doctrine does exist, and when not applied there is a perfectly good reason which is embodied in the doctrine itself.

In Andes Co-operative Dairy Company v. Baldwin, a situation is presented that brings into action the application of the modification to the doctrine. The amount of the security is not sufficient to satisfy the entire indebtedness. The value of the security is unascertained; and to determine it would undoubtedly cause the secured creditor delay and inconvenience. Such creditor should not, under the circumstances, be compelled to deduct the amount of his security from the debt, or to resort to this security upon which the other creditors do not have a lien. The value of the security will not thereby be lost, nor will the other creditors be unjustly deprived of any rights which they might have. If, after applying the proceeds of the security to the balance of the senior creditor's debt, there remains a surplus, the junior creditors are entitled to

this surplus through subrogation (Woolcock v. Hart, 1 Paige 185; King v. McVicker, 3 Sandf. Ch. 210; Checseborough v. Millard, 1 Johns. Ch. 409; N.Y. Co-operative Building Assn. v. Brennan, 62 A.D. 610) or by substitution (Hunt v. Townsend, 4 Sandf. Ch. 510; 5 Pomeroy's Equity Jurisprudence, §2293). Although not stated in the opinion, it would seem that this is the reason for the holding of the court, and that by its decision the court has not laid down any rule that is in conflict with the well recognized doctrine of marshaling of assets and securities.

Burke W. Drummond

CONSTITUTIONAL LAW - DOUBLE JEOPARDY

LIFE AND LIMB - CONCURRENT JURISDICTIONS

The recent case of Commonwealth v. Simpson, (165 Atl. 498, Pa.), presents the question as to just what protection is afforded by the guarantee against double jeopardy, present in the United States Constitution and in the various state constitutions. In this case defendant was indicted for murder first degree and put on trial, the jury sworn and before verdict, without the defendant's acquiescence, or any absolute necessity to do so, the jury discharged. Subsequently, the defendant was again tried under the same indictment for the second degree murder and manslaughter and convicted. The court overruled defendant's pleas of former jeopardy.

The provision of Pennsylvania's constitution (Art. 1,§10), and that of the United States (Amendment 5) are substantially the same that of Pennsylvania reads "No person shall for the same offense be twice put in jeopardy of life or limb". The decision of the court turned on the construction to be given the word "limb".

In Com. v. Hilands (111 Pa. 1), the jury after being sworn was discharged but not through necessity by the trial judge. The defendant was again arraigned and convicted of first degree murder. It was held that this was double jeopardy as he had twice been put in jeopardy of life.

In Com. v. Fitzpatrich, (121 Pa. 109), on the first trial the state did not press for a conviction of murder in the first degree and the court instructed the jury that there was no evidence to support a verdict in the first degree. The court then discharged the jury for failure to agree and it was held that this barred a subsequent trial on the same indictment.

The courts of Pennsylvania have steadfastly held however that in respect of a discharge of the jury without cause the constitutional guaranty applies only to capital cases and thus in McCreary v Cowen (29 Pa. 323) it was held that the discharge without cause of the jury on the trial of the defendants under an indictment for burglary was not a bar to a subsequent trial and conviction for the same offense.

The rule differs in the United States courts where by the term "life and limb" protection against double jeopardy is extended to trials for all criminal offenses. Re. Lange (18 Wall. (U.S,) 163). As above stated the courts of Pennsylvania have not followed such view in its entirety but have permitted the retrial of offenses after juries have been discharged, although such would not be impossible under the Federal interpretation. The Federal rule is that binding on the courts of Pennsylvania, being a limitation on the powers of the Federal Government and not a limitation on the states Barron v Baltionare (7 Pet. (U.S.)243; Brantly v. Georgia, 217 U.S. 284; The court admitted the fact that the view they were taking in the case at bar was not that entertained by the court in Com. v. Fitzpatrick, supra; which followed Com. v. Hilands supra.

They argued that since the defendant on his second trial was being tried only for second degree murder or manslaughter, his life was not in danger and thus the constitutional provision did not apply. This conclusion was based on the reasoning that the term "limb" was an outgrowth of trial by combat and that the words at the present day have no application to anything that exists. The court said, "In administering the criminal law should we by sticking to the bark of an old expression bring about the anomaly that if a man be indicted for murder and be put on trial and the jury is improperly discharged before verdict he is to be set scot free, although his actual offense as the proofs showed was no higher than manslaughter; whereas if the indictment in the first instance had been drawn for manslaughter he could be tried on it again? Where sound reason backs the ruling we feel constrained to lop off dead limbs from the trunk of the criminal law and thus give the tree greater virility in its living branches."

The cases for over a century have negatived the present contention of the state. The courts have always held that the constitutional provision applied to all capital cases, though no case has ever been cited showing its applicationto a crime of inferior degree. McCreary v. Com; Com. v. Hilands, ; Com. v. Fitzpatrick, supra. Chief Justice Tilghman in Com. v. Cook, (6 Serg & R 577), questioned the expediency of giving courts the power to discharge juries in capital cases except for overwhelming necessity. As to the contention that the term "limb" had its origin in the ancient trial by battle it must be remembered that trial by battle was never resorted to in Pennsylvania and was practically obsolete in England long before the first constitution of Pennsylvania was developed. Obviously Justice Tilghman could not have had trial by battle in mind when they decided in Com. v. Cook, supra, that the constitutional inhibition against putting a person twice in jeopardy for the same offense required the complete discharge from the indictment for murder of prisoners who had been once tried on the same indictment, by a jury discharged by the court before a verdict was rendered, without prisoners consent or any absolute necessity.

While perhaps the present construction of the court comports more with sound public policy and with the necessity now existing in dealing with law - breakers yet the court in their zeal should not usurp a power of the ligislature. Com. v. Simpson, supra. When the true meaning of a constitutional provision is officially determined by a court of last resort, that interpretation becomes in legal effect a part of the constitution and should be changed only by the method the constitution itself provides. Com. v. Simpson, supra. Pruning the constitution is not a judicial function. South Carolina v. United States, (199 U.S. 437). The meaning of the constitutional provisions is fixed at the time of their adaption; and the construction given them must be uniform so that the operation of the instrument will be inflexible, operating at all times alke, and in the same manner with reference to the same subjects. (12 C.J. p. 78.)

Jeopardy is used to denote the danger of conviction and punishment which the defendant in a criminal action incurs when a valid indictment has been found and a jury impaneled and sworn to try the case and to give a verdict. State v. Manning, (168 Mo. 418);People v. Galdforb,(152 A.D. 870). The terms "jeopardy of life and liberty for the same offense", and "jeopardy of life or limb", "jeopardy for the same offense", "twice put in jeopardy of punishment", and other similar provisions used in the various constitutions are to be construed as meaning substantially the same thing. State v. Finaling, 123 Minn. 413; Stant v. State, 36 Okl. 744. The provision in the New York State Constitution is "No person shall be twice put in jeopardy for the same offense," Art. 1. §6. That no one shall be twice put in jeopardy for the same offense is an ancient and well-established doctrine. It is embodied in the maxim of the civil law, Non liis in idem, 3. Bouvier L.D. 2354, and is embodied in the very elements of the common law and is expressed in several of its maxims Ex. p. Lange, 18 Wall. (U.S.)163. It is contained in the United States Consitution and there are similar provisions in nearly all the constitutions of the various states. It is now well settled that the provision of the constitution of the United States prohibiting a second jeopardy does not bend the states, but applies only to offenses against and trials under the laws of the United States. Barron v Baltimore, 7 Pet. 243.

In construing such a constitutional provision resort may be had to the common law since such provisions are a mere recognition of a maxim of the common law. The purpose of the courts should be so to apply this constitutional guaranty as to protect the citizen from vexatious criminal prosecution and at the same time not to defeat the chief design of our penal laws which are from their reformatory aspect have in view the double aim of protecting society and preventing crime. State v. Dewall , 135 LA. 710; Ex.p.Lange, 18 Wall. (U.S. 163.

Jeopardy in its constitutional or common law sense has a strict application to criminal cases only. Sire v Berkshire, 185 Fed.867. Although in strictness the constitutional provisions apply only to felonies, courts generally have been guided by the spirit rather than the letter of the law and have applied the doctrine to all indictable offenses including misdemeanors. Wemyss v. Hopkins, L.R. 10 Q.B. 378, but in some jurisdictions the doctrine has been held to have a narrower scope. McCreary v. Com., supra; State v. Spear, 6 Mo. 644. The doctrine does not apply to proceedings to depart ahens, to prosecutions for contempt or civil proceedings to remove public afficers for neglect or malfeasance in office. People v. Meakins, 133 N.Y. 214.

The general rule established by the preponderance of judicial opinion and by the best considered cases is that when a person has been placed on trial on a valid indictment or information, before a court of competent jurisdiction, has been arraigned, and has pleaded and a jury have been impaneled, and sworn, he is in jeopardy; but that, until these things have been done, jeopardy does not attach until a valid verdict, either of acquittal or conviction, has been rendered. People v. Goldfarb, 213 N.Y. 664. He is not in jeopardy when the court had no jurisdiction. People v. Connar, 142 N.Y. 130, or on a discharge on preliminary examination by a magistrate, to

determine whether to hold a man for grand jury. People v. Dillon, 197 N.Y. 254; People v. Hendell , 59 Misc. 354; a conviction or an acquittal on impeachment or on a courts martial is no bar to a subsequent indictment for the same crime.

In People v. Wendell, supra; defendant was dismissed from the army for falsifying accounts and conduct unbecoming an officer. He was later indicted and convicted for grand larcency and the court held that it was not double jeopardy, being an offense against two separate and distinct jurisdictions and thus punishable by both.

Where the act committed involves both a criminal and a civil penalty, prosecution of one is no bar to the other. People v. Meakim, 133 N.Y. 214. Also, if an erroneous judgment is granted after a legal verdict, a legal judgment may be imposed. Raysky v. People, 29 N.Y. 124.

But on the other hand, after an acquittal on the merits, the verdict cannot be set aside. This is brougnt out in Kepner v. United States, 195 U.S. 100. The defendant was a lawyer in Manila and was charged with the embezzlementof the funds of a client. He was tried and acquitted of the offense charged and on appellate proceedings to the Supreme Court judgment was reversed and sentence imposed. The court held this to be double jeopardy.

"In all cases where a jury are discharged as prevented from giving a verdict, by reason of an accident or other cause, except where the defendant is discharged from the indictment, during the progress of the trial, or after the cause is submitted to them, the case may be again tried, at the same or another term." C.Ex.P.430.

In People v. Fishman, 64 Misc. 256, defendant was indicted for second degree grand larceny and a juror was withdrawn and the jury then discharged, because of a conversation about the case between the complaining witness and the foreman of the jury, during the progress of the trial. The court held that this was no bar to a second trial since the jury was discharged for good cause by consent of both parties.

But where a jury is arbitrarily and without legal justification discharged without defendants consent, it is jeopardy as was brought out in People ex rel Stabile v. Warden, 202 N.Y. 138. Here the jury on relator's trial for murder retired for deliberation at 5:15 pm and at 10:10pm. were brought into court by order of the court without informing defendant or his counsel of the purpose of, and without jury requesting it. the forman in response to a query by the court, stated that they had not as yet agreed upon a verdict. They were thereupon discharged. It was held that the jury were improperly discharged and such action was a bar to further prosecution.

"After the jury have retired to consider of their verdict, they can be discharged before they shall have agreed thereon, only in the following cases:-

1. Upon the occurrence of some injury or casualty affecting the defendant, the jury, or some one of them or the court, rendering it inexpedient to keep them together longer; or

2. When after the lapse of such time as shall seem reasonable to the court, they shall declare themselves unable to agree upon a verdict; or

3. When with the leave of the court, the public prosecutor and the ccunsel for the defendant consent to such discharge." C.Cr.P. 428. See People v. Neff, 191 N.Y. 210; Thompson v. United States, 155 U.S. 271; United States v. Perez, 9 Wheat. 579; State v. Turpin, 54 Arizona, 162; Com. v. Shoemaker, 240 Pa. 255; The Penal Laws of most of the various states have similar provisional provisions and the cases hold uniformly throughout the country.

The statutory prohibition is against a second jeopardy for the same "offense", that is, for the identical act and crime. Burton v. United States, 202 U.S. 344, or as expressed in a number of cases, to entitle a defendant to plead successfully former jeopardy, the offense charged in the two prosecutions must be the same in law and fact. People v Rodgers, 184 A.D. 641; Com. v. Raby, 12 Pick. (Mass.) 496; People v. Kerrick, 144 Cal. 46; Miller v. State, 33 Ind. 509. In People v. Rodgers, supra, defendant was indicted for first degree robbery as a second offense on the person of one Alex Gerber and a second indictment was found against him for an attempt to commit robbery in the first degree as a second offense on the person of one Sam Gerber. The of the crime was the holding up of a grocery store run by the two borthers. The defendant was found not guilty on the first indictment and was subsequently tried and convicted on the second. The court held his plea of double jeopardy was not good for he could not under the first indictment have been convicted of the crime charged in the second. It is not necessarily decisive that the two offenses may have some material fact or element in common. State v. Schmidt, 92 Kan. 457 or that they are similar, where they are not in fact the same. Creech v. State, 70 Tex. Cr. 229. The test is not whether defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. Res v. Barron, 2 K. B. 570; Ryan v. United States, 216 Fed. 13; Mory v. Conn. 108 Mass. 433. The term "same offense" however, does not signify eo nomine, but the same criminal act, transaction or omission; and it is not essential to sustain a plea of former jeopardy. that the proofs in the two prosecutions be identical; Williams v. State, 58 Tex.Cr. 193. it is sufficient if an acquittal of the offense charged in the first indictment virtually indludes an acquittal of that set forth in the second, however much they may differ in degree Com. v. Raby, 12 Pick.(Mass.) 496. Thus an acquittal on an indictment for murder will be a good bar to an indictment for manslaughter and conversely. Some courts have greatly expanded the natural and ordinary meaning of the words "same offense" so as to include all lesser degrees that fairly may be included in the major charge.

"Where a prisoner is acquitted or convicted on an indictment for a crime consisting of difference degrees, he cannot thereafter be indicted or tried for the same crime, in any other degree, nor for an attempt to commit the crime, or any degree thereof." P.L.§32.

The reason for the above rule is madeclear when read in conjunction with C.Cr. P. 444 "on an indictment for a crime consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any dgree inferiorthereto, or of an attempt to commit the crime upon a trial for murder or manslaughter, if the act complainted of is not proved

to be the cause of death, the defendant may be convicted of assault in any degree constituted by said act, and warranted by the evidence. A conviction on a charge of assault is not a bar to a subsequent prosecution for murder or manslaughter, if the person dies after the conviction, in case death results from the injury caused by the assault."

Under the statute conviction for an inferior degree is not allowed unless the facts permit conclusion that he is guilty of that degree. People v. Meegan, 104 N.Y. 529. Since under the statute defendant can be found guilty of any crime the commission of which is necessarily included in that with which he is charged in the indictment C.Cr.P. 445 on an acquittal or conviction of the crime charged he cannot be tried for any crime necessarily included in the crime charged. Thus in People v. McGawan, 17 Wend. 386, defendant was indicted, tried and acquitted of robbery for stealing watches and the court held that his subsequent indictment and trial for larceny of the same watches was illegal and void under the statute. Where there is no possible view of the facts which would justify any other verdict except a conviction of the degree charged or an acquittal, a refusal by the court to charge the various degrees of crime is not error. People v Schleiman, 197 N.Y. 383. On a prosecution under an indictment charging "assault with a loaded revolver and firing same with intent to kill," it is not error to refuse to charge that jury may find defendant guilty of assault third degree, since if he fired the shot he was guilty of assault in the first or second degree, and if not he was guilty of no offense under the indictment. People v. Ranlazzo, 127 A.D. 824.

The immunity from second jeopardy granted by the constitution is a personal privilege which the accused may waive. People v. Stall, 143 Cal. 689. Such a waiver may be express or implied State v. White, 71 Kan. 356. Thus a person who has been placed on trial before a competent court and a jury impaneled and sworn but who by his own act during the course of the proceedings makes it impossible for a valid verdict to be rendered against him, is not entitled on a subsequent indictment for the same offense to plead double jeopardy State v. Dry, 152 N.C. 813. The question of double jeopardy may be raised where the facts upon which such plea is based appears of record in the same case, by a plea in bar, or by a motion for discharge of defendant, or by objecting to entering upon the second trial upon such ground, or by any appropriate manner by which it is called to the attention of the court. Com. v. Daniel, 9 Ky. 96; Terr v Saboto, 17 N.M. 666. But such question must be raised at the first opportunity and if the constitutional privilege insisted upon before entering upon a trial on the merits, it is waived. State v. White, 71 Kan. 356. The objection is too late when taken for the first time on a motion for arrest of judgment or for a new trial People v. McGimmo, 234 Ill. 68.

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The recent case of People v. Spitzer, 148 Misc. 97, presents another interesting interpretation of the question of double jeopardy.

In this case defendants were charged by the grand jury of New York County with intentionally making a false canvass in the performance of their duties as election inspectors in the election held

in New York County November 1932. Election Law §262. The defendant had previously been convicted in the United States district court of wilfully and knowingly combining and conspiring to injure and oppress voters, by depriving them of their electoral rights in such election. The defendants plea of double jeopardy was sustained. In the federal court the overt acts of the defendants were the sole basis from which the jury were asked to infer a consiracy or a corrupt combination. Practically the only evidence by law to be certified to by the inspectors. The figures found on the voting machine which was used the day in question was then submitted and the discrepencies were apparent.

The Federal statute under which the defendants were tried in the United States Courts was as follows:

"If two or more persons conspire to injure oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States, or because of his having so exercised the same, ------they shall be fined not more than $5000 and imprisoned not more than 10 years, and shall, moreover, be thereafter inelgible to any office or place of honor, profit or trust created by the constitution or laws of the United States." U.S.Code tit.18,§51.

§§753 and 756 of the Penal Laws of New York make felonies, the intentional making of a false statement of canvass of such votes. It is thus apparent that the unlawful overt acts which were proved against and resulted in the conviction of the defendants in the Federal Court are the precise acts which are made felonies by the state statute.

The evidence supports both indictments and the offenses are identical in law and fact.

In upholding the plea of former jeopardy the court held diametrically apposite to the rule followed in the United States Courts as established in United States v. Lanza, 260 U.S. 377. In this case Lanza and others were indicted for vilating the National Prohibition Act. They were charged in five counts with manufacturing transporting and possessing intoxicating liquor. The defendants set up that they had been convicted in a court of Washington State for transporting and possessing the same liquor, under a statute of the state. The plea of double jeopardy was not upheld. The court said in substance that in the case at bar, there existed two sovereignities, drawing powers from different sources and capable of dealing with the same subject matter within the same territory. Each government in determining what should be an offense against its peace and dignity was exercising its own sovereignity, not that of the others. Thus an act denounced as a crime by both national and state sovereignities is anoffense against the peace and dignity of each and may be punished by both. The fifth amendment applies only to proceedings by the Federal government. Barron v. Baltimore, supra, and the double jeopardy therein forbidden is a second prosecution under authority of the Federal government. Here the act was an offense against both the State of Washington and the United States and thus could be properly punished by each.

However, the rule followed in the United States Courts is not that of New York. The Fifth amendment, providing against double jeopardy, has been construed to prohibit such, only when both offenses are under "the same authority." Barron v. Baltimore, supra.

Our constitution (Art. 1,§6) forbids that a person "be twice put in jeopardy for the same offense". A statute provides "No person ca be subjected to a second prosecution for a crime for which he has been once prosecuted and duly acquitted or convicted." (Code Cr. Pro. §9). Another New York Statute provides that when an offense is committed under such circumstances that the courts of this state and of another state or county have jurisdiction and a defendant has been convited or acquitted in the other state or country, in a criminal prosecution on the merits, the acquittal or conviction there is a sufficient defense here . (Penal Law §33). And a third statute provides that when an act charged as a crime in another jurisdiction is also a crime in this state, a conviction or acquittal in the former, is a bar to a prosecution therefor in this state (Code Crim. Proce. §139).

Thus the court in sustaining defendants plea of double jeopardy followed clearly the law as existing in this state. It is interesting to note that if the defendants had been first tried and convicted for violating the election law of New York, they could have been subsequently convicted of the same offense under the Federal statute, following the reasoning of United States v. Lanza, supra, but when the order of trial and conviction is reversed such would not be possible under our law.

The holding of the court is People v. Spitzer, supra, while the rule followed in New York is contrary to the holding of most state courts on the subject. An acquittal or conviction in a Federal Court, it has been held, will not bar a prosecution in a state court for violation of a state law, although the two prosecutions are based on the same act or transaction.

In State v. Moore, 143 Iowa 240, the court held that a conviction in the Federal court for breaking and entering a post-office with the intent to commit a larceny under the Federal statutes, would not be a bar to a prosecution by the state for burglary under an indictment based on the same facts.

The court in United States v. Regan, 273 Fed. 727, in a prosecution in the Federal court for unlawfully transporting liquor in New Hampshire decided that a plea in bar was insufficient which alleged that the defendant had pleaded guilty in the state court and was fined for the same unlawful transaction.

It was held in Byron v. State of Georgia, 108 S.E. 63, that one who has already pleaded guilty in a Federal court for illegally possessing liquor, could be legally punished in the state court for possessing the same liquor in violation of a state prohibition law.

In regard to the particular class of cases coming under the prohibition laws there is a conflict of authority, some of the states holding that a prior acquittal or conviction under a Federal statute bars a subsequent trial in the state court for the same offense.

Thus in State of Oregon v. Smith, 199 Pac. 194, where defendant had been convicted under a Federal Statute for possessing liquor, such fact was held a bar to prosecution under a state law for an offense based on the same facts.

The Federal courts in general hold that an acquittal or conviction in the courts of a state under a state statute will not bar a prosecution in the Federal courts, under a Federal statute, based on the same act or transaction. The question was authoritatively decided in the recent case of United States v. Lanza, supra, the opinion being written by Chief Justice Taft. This case reverses the decision in United States v. Peterson, 268 Fed. 864, which held that a conviction in a state court for conduct which was in violation of the Federal Prohibition Act was a bar to prosecution in the Federal courts, the court saying that it seemed manifest that it was the intent that a person should not be punished by the state and Federal law for the same offense. In this case pleas in bar of a prosecution under the National Prohibition act, setting forth conviction in the state court on the same facts, were sustained. Other recent cases upholding the doctrine laid down in United States v. Lanza, supra are: Layman v. State of Alabama, 93 So. 66; Fox v. Ohio, 5 Haw. (U.S.) 410; U.S. v. McCann, 281 Fed. 880; Couley v. Georgia, 152 Ga. 469;

The reason for the rule is both logical and apparent. The people of the United States resident within any state are subject to two governments, - one state and the other national, - but there need be no conflict between the two. True, it may sometimes happen that a person is amenable to both jurisdictions for one and the same act. Thus if a marshall of the United States is unlawfully resisted while executing the process of the courts within a state, and the resistance is accompanied by anassault on the officer, the sovereignity of the United States is violated by the resistance and that of the state by breach of peace in the assault. So, too, if one passes counterfeit coin of the United States within a state, it may be an offense against the United States and the state, against the United States because it discredits the coin; and against the state, because of the fraud upon him to whom it is passed. This does not however, necessarily imply that the two governments possess powers in common, or bring them into conflict with each other. It is the natural consequence of a citizenship which owes allegiance to two sovereignities and claims protection from both. The citizens can't complain, because he has voluntarily submitted himself to such a form of government. He owes allegiance to the two departments, so to speak, and within their respective sheres, must pay the penalties which each exacts for disobedience to its laws. In return, he can demand protection from each, within its own jurisdiction. United States v. Cruikshank, 92 U.S. 542.

Although the weight of authority is to the effect that a prosecution and conviction or acquittal under the courts of one jurisdiction - state or Federal - will not bar a prosecution in the courts of the other, based on the same act or transaction, yet it does not follow that punishment will necessarily be imposed and executed in the courts of both jurisdictions. A sentence in one jurisdiction may be taken into consideration in fixing the penalty in the other, where the court has a discretion in the matter, or

the execution of the subsequent sentence may be suspended. There is authority to support the doctrine, that punishment in the courts of each jurisdiction, even though not prohibited, should not, in practice, be imposed, unless in extra-ordinary cases, where there are aggravating circumstances or special considerations from the stand-point of public safety justifying or requiring it.

The court in United States v. Holt, 270 Fed. 639; approved the doctrine that it is contrary to the naute and genis of our government to punish an individual twice for the same offense; and held that, while a conviction of the defendant for violation of a state prohibition law would not justify a Federal court in refusing permission to file an information against the same defendant based on the same transaction, for violation of the volstead act, in view of the fact that under that act offenses subsequent to the first conviction were to be more severely dealty with, yet, if the defendant pleaded guilty to the charge the circumstances of his previous punishment would be given consideration, a record made of his conviction, to protect the government in case of a repetition of such acts, and a nominal penalty would be imposed.

And in Re Murphy, 5 Wyo. 297, the court in upholding a territorial law punishing bigamy, as against the objection that to do so would subject the offender to a prosecution under the laws of the United States, in violation of the constitutional provision against double jeopardy, said, "In the interests of justice, after a man has been tried for an offense in the courts of the one government, the courts of the other for the same act, would, within the scope of their authority, in some way suffer the accused to obtain the benefit of the former trial, whether thereon he had been acquitted or convicted; although such courts would not be absolutely bound to extend such advantage to the offender". For other cases bearing on this doctrine see; United States v. Amy, 14 Md. 149; Peo. ex. rel. McMahon v. Westchester County, 1 Park. Crim. Rep. (N.Y.) 659; Jett v. Com., 18 Gratt (Va.) 933).

In concluding this necessarily brief resume of the subject of double jeopardy let it be remembered that the right of a defendant to be tried only once for the same offense has long been recognized and cautiously guarded by the common law among English speaking nations, and has been restated and preserved to us by our constitutions, as well as by various statutes; and the rule that safeguards this ancient and important right should not be so attenuated and hedged about by techincality and refinement as to render its application difficult, or its security uncertain. However, courts in their zeal to chastize law breakers, especially with the present day crime wave, should not overide well founded and settled legal principles and statutes in attempting to attain this end. Such function rightfully belongs to the legislature and may not be usurped.

Eugene H. BeHage

CIVIL ACTION FOR RAPE - CONSENT

The decision of the court in Barton v Bee Line, Inc.,(238 App. Div. 501) makes a distinct departure from all other reported cases on the subject, both in this State and in other jurisdictions. (Gaither v. Meacham, 214 Ala.343). The plaintiff, who was fifteen years of age when the action arose, claimed that while a passenger of the defendant a common carrier, she was forcibly raped by defendant's chauffer. The liability of defendant if the chauffer assaulted the plaintiff was conceded. The trial court charged the jury that plaintiff was entitled to recover even if she consented. On appeal the court held the charge was erroneous and stated it was of the opinion that a female under the age of eighteen has no cause of action against a male with whom she willingly consorts, if she knows the nature and quality of her act, thus leaving the question as to whether she knew what she was doing and fully understood the significance of the act to the jury, and not leaving it as a matter of law.

The charge of the trial court was based on subdivision 5 of section 2010 of the Penal Law which provides: "A person who perpetrates an act of sexual intercourse with a female, not his wife, under the age of eighteen years, under circumstances not amounting to rape first degree, is guilty of rape in the second degree, and punishable with imprisonment for not more than ten years." The trial court in effect made the provisions of the act the basis for civil liability. This case holds that there can be no doubt that the purpose of the enactment was to protect the virtue of females and to protect society from the ills of promiscuous intercourse. There is no doubt that a female who is ravished has a cause of action against her assailant. (Koenig v. Nott, 2 Hilt. 323). The question is whether a female under eighteen having consented has a cause of action if she knew the full nature of her act. The court seems to think that society is sufficiently protected by the Penal Law and that to go further and give a right for a civil action is defeating the purpose of the provision "by making incapacity to consent a sword to desecrate instead of a shield to save".

There appear to be no other decisions holding this way. (Gaither v. Meacham, supra). In New York State, for as far back as 1895, at least, the decisions have held to the theory that a female under the statutory age was incapable of giving consent. In Dean v. Raplee, (145 N.Y. 319) the action was to recover damages for an assault which was committed in circumstances such as to constitute the crime of rape. The plaintiff was fourteen at the time of the assault. The case was tried on the theory that she must have used resistance in order to recover. Between the time of the assault and the trial the statutory age had been raised by the legislature. On appeal the court said that while the case must be tried on the basis of the law as it stood at the time the cause arose, that "the act eliminated the question of consent or resistance from the case of an assault upon a

female under the age prescribed by the statute". This same principle was followed in Colby v. Thomas, (99 Misc. 158) and in Boyles v. Blankenhorn, (168 App. Div. 388).

The sentiments of the various courts on the subject are well summed up in a statement made in Bishop v. Liston, (112 Neb. 356) where in answer to the defendant's argument that it was not the nature and purpose of the Legislature in changing the criminal law to enlarge civil liability the court said, "The purpose of the Legislature in changing the common law as to the facts necessary to constitute rape was to protect the virtue and chastity of female children of tender years who have not attained such a degree of mental development as to fully comprehend the nature and effect of the immoral and unlawful act. The statute says that up to a certain age they are incapable of giving consent to the violation of their persons, with consequent degradation, humiliation and shame. It further says to the libertine who would rob a virtuous maiden, under eighteen years, of the priceless and crowning jewel of maidenhood, that he does so at his own peril". Other cases in accord with this holding are: Hough v. Iderhoff, (69 Ore. 568); Priboth v. Haveron, (41 Okla. 692); Watson v Taylor, (35 Okla. 768); Altman v. Eckermann, (132 S.W. 523, Texas Ct. of Appeals); Gaither v. Meacham, supra; Witzka v. Mondry, (83 Minn. 78); Brunet v. Deshotels, (160 La. 285); Herman v. Julian, (117 Kan. 733); Bishop v. Liston, supra; Schenck v. Dunkelow, (70 Mich. 89); Parsons v. Parker, (170 S.E. 1 - Va.).

At first blush it seems very unjust to permit a female who has consented to the act to recover civilly when she appears to be in pari delicto. To take an extreme case, assume the female lacks a few days of reaching the statutory age and the injustice seems to stare one in the face. Yet on the other hand, in any case where a certain age is set by statute as the age of consent and discretion and the same thing appears. An infant who lacks but a day of reaching his majority may disaffirm a contract made by him as an infant and that even though he may have lied about his age to induce the other party to contract with him. (International Text Book Co. v. Connelly, 206 N.Y. 188). The court in the case just cited says that "To hold otherwise would in many cases deprive infants of the protection extended to them at an age when the mind and judgment are conclusively presumed to be immature and the need to be shielded from their own imprudence and folly. It would virtually overthrow the law upon the subject as it has existed for time out of mind". The Legislature, evidently for the same reason, has provided that if an infant under the age of consent marries without permission from his or her parents the marriage may be annulled. C.P.A. §1133. Similarly the Legislature has said that a person under eighteen cannot consent to sexual intercourse with a man not her husband. Penal Law §2010, subd. 5. It would seem very inconsistent to turn around and in a civil action hold that the same person did fully understand and comprehend the nature of the act unless the Legislature meant to confine its ruling to the narrow field of criminal responsibility, which, in view of the public morals sought to be protected would seem too narrow and interpretation. Is it reasonable to hold that a person has not judgment to decide in matters purely contractual, but that the same person

does have sufficient judgment to give herself away? If there is any distinction that should be made it would seem proper that it should be more favorable to the female in the latter case.

It is not necessary that any injustice should be done in allowing a female a cause of action even though consenting to the act. No premium is being placed on unchastity. In assessing damages, the age of the plaintiff, her willingness, and her previous chastity or unchastity would be proper elements for the jury to consider. (Gaither v. Meacham, supra, Parsons v. Parker, 170 S.E.1-Va.).

It seems that a very strong argument should be set forth to justify a decision contrary to such an array of authority as there is on this particular point. The court gives very little argument but states that it is not in accord with the views expressed in those decisions. In justification of the decision in the case at hand it may be said that the whole thing boils down to a matter of public policy. What the public policy has been is well pointed out by the number of cases holding contrary to this recent decision. Public policy does change and when it does the courts change with it even if the holdings of many years must be upset. (Strauss v. Canadian Pacific R.R.,256 N.Y. 407). At the present time the public policy of two departments of the Appellate Division is different. There appears to have been no suggestion in any recent cases that our policy was changing on this subject nor any thorough discussion of the matter in Barton v. Bee Line, Inc., supra.

George Britten

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EDITOR'S NOTE:

By §59 of the Vehicle and Traffic Law there is created a liability upon the part of the owner for negligence caused through the act of any one driving his car with his consent, express or implied; but any person, firm, association, or corporation engaged in the business of renting or leasing motor vehicles to be operated on the public highway and which causes to be carried public liability insurance is not subject to the provisions of this section. In a discussion of this section when construed by the Appellate Division in Atkins v. Hertz Drivurself Stations, Inc., (237 A.D. 31) the LAW REVIEW (Vol. II, No.3, pg.88) in disagreeing with the decision of the Appellate Division, considered the classification thus enunciated by the Legislature unreasonable and unconstitutional. That such, however is not the case is conclusively determined in the unanimous affirmance of the Appellate Division by the Court of Appeals, in 261 N.Y. 352.

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REAL PROPERTY - FIXTURES

THE NEW INSTITUTION THEORY

The status of applicances such as gas ranges and electric refrigerators is a problem which has come to the fore in recent years. Several theories have been advanced, one of which is found in a recent case in the Court of Errors and Appeals of New Jersey. (Russ Distributing Corp. v. Lightman, 111 N.J.L. 21). In this case the status of electric refrigerators was discussed. Under a conditional sales contract there was installed in an apartment house a refrigerating plant consisting of three compressors located in the basement. These were connected up by pipes or risers carried up through the floors and connecting with thirty-five coils contained in thirty-five cabinets, one in each apartment in the building. The controversy as to ownership arose between the claimants under the conditional sale contract and a subsequent purchaser at sale decreed upon foreclosure of a mortgage on the realty. The trial court held that these articles of property were not part of the realty and could be removed without material injury to the freehold by merely uncoupling the couplings, and that therefore no assent by a subsequent purchaser of the realty to reservation of title in the conditional vendor was necessary. The court of Errors and Appeals in reversing judgment of the trial court which had directed judgment in favor of the conditional vendor said that "material injury to the freehold as used in the Uniform Conditional Sales Act has been construed by this court to means an injury to the institution of which the structure is a part". This theory is the result of the rapid growth of the apartment house in our metropolitan communities. It rests upon the doctrine that the apartment house is not a completed institution without certain equipment, such as gas ranges and refrigerators, and cannot function properly without such equipment. (Future Building & Loan Association v. Mazzocchi, 107 N.J.Eq.442; Cohen v. Generals Motors Acceptance Corp., 51 R.I. 153).

The determination as to whether or not articles of property attached to realty remain purely personalty in New York has arisen with the enactment of Section 67 of the Personal Property Law, (Consolidated Laws Ch. 41 as added by Ch.642 of the Laws of 1922). The term "fixture" has been defined as an article so annexed to land as to raise a question between claimants as to whether it is part of the realty or is removable as personalty. (1 Reeves on Real Property, p. 12-14). It was with reference to this indeterminate class of property that the Legislature enacted that part of §67, Personal Property Law, which says in substance that if part of the property is so affixed to the realty as to become a part thereof, but severable with out material injury to the freehold, the reservation of title to such property under a conditional sale contract shall be void after the goods are so affixed as against subsequent purchasers of the realty for value and without notice of the conditional seller's title unless the contract be filed before such purchase in the office where a deed of the realty would be recorded or registered to affect such realty. (Kohler Co. v. Brasun, 249 N.Y. 224). In that case the court construed this statute as intended to protect buyers of real estate upon which some types of property are attached in such a manner as to render uncertain their character as realty or personalty.

Equally, the court said, it operates as a protection to the conditional vendor of a fixture. The question confronting us then, is whether articles such as gas ranges and refrigerators in apartment houses should come within §67 Personal Property Laws as that indeterminate class of property which has been classified as fixtures. This can be done by an application of the institution theory advanced in Russ Distributing Corp. v. Lightman, supra. The question then is, do the courts of this state favor this theory and if not, should they adopt such viewpoint.

The New York Court of Appeals has consistently held that such articles as gas ranges, stoves and refrigerators are purely personalty and remain so when installed in homes of every description. The distinction between realty and personalty as construed by the New York courts seems to be merely the mode of annexation and the actual physical injury to the freehold sustained in the removal of such property. These articles are held to be personalty as a matter of law. According to these cases these articles are personal property which, irrespective of an agreement that they remain such, do remain intrinsically personalty. In the case of In Re Albanese (44 Fed.602), the court in referring to the gas range cases in New York said that these cases relate to articles of household use easily attached to and detachable from some prepared fixture in the building capable of being easily moved and taken from house to house. (Modfes v. Beverly Development Corp ., 251 N.Y. 12; Central Union Gas Co. v. Browning, 210 N.Y. 10; Alf Holding Corp. v. American Stove Co., 253 N.Y. 450; Cosgrove v. Troescher, 62 A.D. 133; Cohen v. 1165 Fullerton Ave. Corp., 251 N.Y. 24; Lloyds First Mortgage Corp. v. Lombardo, 227 A.D. 400; Modern Security Co. v. Thwaits, 138 Misc. 469; Minett v. Durnherr, 135 Misc. 259; Kelvinator Sales corp. v. Byro Realty Corp., 136 Misc. 720; Chasnov v. Marlane Holding Co., 137 Misc. 332).

The leading case in New York on this subject is Madfes v. Beverly Development Co., supra, In that case a conditional seller sold to the owner of an apartment house a number of gas ranges, which were installed by a single coupling to the gas service pipes. Then the owner of the realty gave the plaintiff a mortgage covering the realty. The mortgagee had no knowledge or notice of the reservation of title in the ranges in the conditional vendor. In the controversy which followed as to the title to the gas ranges the court said that certain chattels are personalty and remain so independent of an agreement between the parties which so provides. If the property had in its own nature a determinate legal character either as realty or personalty the manner in which the parties treated it would not change that character. (McRea v. Central National Bank of Troy, 66 N.Y. 489).

To apply the institution theory laid down in Russ Distributing Corp. v. Lightman, supra, would then be contrary to established New York Law. According to the Madfes case such articles of personalty as gas ranges and electric regrigerators could not by the advancement of the institution theory be made a thing of controversy. This doctrine has been strictly followed by our courts in later decisions which hold that gas ranges, electric refrigerators and other articles of property remain purely personalty. (Minett v. Durnherr, supra), and are so obviously personalty that §67, Per-

sonal Property Laws has no application to them whatsoever (Modern Security Co. v. Thwaites, supra) and a subsequent mortgagee of the realty acquires no title to such.

True, the institution theory has been advanced in the courts of New York. Some cases can be found in the inferior courts wherein the decisions of such courts was based upon the argument that articles which are attached to the freehold as permanent improvements are fixtures attached to the realty, although removeable without material physical injury to the freehold, (Pratt v. Baker, 92 Hun 331; Buckley v. Buckley, 11 Barb. 43; Funk v. Brigaldi, 4 Daly 359).

In the case of Williams v. London, (61 Misc. 494) the court held that ice boxes installed in an apartment house by the owner for the convience and accommodation of the tenants underwent a constructive annexation to the realty and were subject to a mechanic's lien. Here we find the court recognizing that this property although originally personalty lost that character of pure personalty in spite of the fact that it was only slightly attached to the freehold, because of the character of the purpose, use and its relation to the apartment house as a complete unit. It was this same opinion which led the court in the case of Realty Associates v. Conrad Construction Corp, (185 A.D. 464) to say, in speaking of the heating system of boilers and radiators in a house, that the character of the property is determined by the adaptability to the use to which the realty was devoted, the intention that the property become a permanent accession to the realty. The same conclusion as to the method of determining the status of property was found by the court in Gould v. Springer, (206 N.Y. 641).

The opinion in Realty Associates v. Conrad Construction Corp., supra, continued by stating that to allow removal of these articles of property as personalty would be to leave the house unfitted for its use in housing tenants.

This theory was ably presented in Madfes v. Beverly Development Co., supra, by Judge Crane in his dissenting opinion. In this he said in substance that there are circumstances when the law considers realty as transformed into personalty and chattels so annexed to the realty as to become a part thereof. It is a fact that articles of this kind will be made part of the house for permanent retention and use in the places where they are put. Lord Halsbury in Leigh v. Taylor, (1902 App. Cases 157, 161) said that "the facts have been regarded in different aspects, according to the fashion of the times, the mode of ornamentation, the mode in which houses were built and the degree of attachment which from time to time became necessary or not according to the nature of the structure which was being dealty with."

It is a fact, says Judge Crane, that the law must keep abreast of the changes in social conditions and the business of housing. Today people live in apartments, communities in themselves, with all modern improvements which are considered part of the realty and so treated by every owner and tenant. The owner installs them because the tenant expects them as part of the apartment he is leasing, just as he expects to find doors and windows there when he commences his tenancy.

While this dissertation is a good expression of the modern trend of liberal attitude of the law, that it should conform to the changing evolution of civilization, it is but a dissenting theory in New York. The ruling law in New York as expressed by Judge Kellogg in Madfes v. Beverly Development Co., supra, disposes of this argument by the rule of stare decisis. He says in substance that the difficulty with adopting Judge Crane's views is that in the case of Central Union Gas Co. v. Browning, supra, the same conditions existed as exist now, apartment houses of similar size and equipment to those referred to by Judge Crane were then familiar structures. In that case which arose before the enactment of §67 Personal Property Laws the court in speaking of the property in controversy,- gas ranges installed in an apartment house - said that the ranges were not attached to the realty to become part of it as a matter of law, and that therefore a properly filed conditional sale contract was not necessary to protect reservation of title as against a subsequent bona fide purchaser of the realty. The ranges were attached to the gas service pipes by a simple coupling and the court said; "we think the ranges situated as they were lost none of their characteristics as personal property". Thus the court in Central Union Gas Co. v. Browning, supra, laid down a rule of property which has doubtless governed the conduct of buyers and sellers in innumerable sales which have since been made and is conclusive on this issue and requires us to hold that the gas ranges in question are not subject to the lien of the mortgagee. (Madfes v. Beverly Const. Corp; supra).

In the face of this stolid wall of precedent it is hard to see how the Court of Appeals could in the future change its opinion and distinguish these cases from future controversies which may arise. It seems inescapable that there must be some change in the future to attain a just and practical holding. There is a great deal to be said for the argument of the court in holding that these articles remain purely personalty. If it were to hold otherwise there is no telling where the line of demarcation separating purely personalty from other types of property would be set, if it could be set anywhere. The court has attempted to retain a clear-cut distinction between the three classes of chattels. Yet, with the rapid advance of scientific achievement along all lines the institution theory ought to be recognized and should be recognized, else this precedent bound attitude of our courts will in most likelihood work a very impracticable and unjust result.

Perhaps the soundest solution is the one suggested in both the majority and dissenting opinion in Madfes v. Beverly Development Corp., supra, wherein the court says: "We do not feel it to be the province of the court now to alter a rule of property so well established. If relief be needed, the Legislature may provide it." Judge Crane in dissenting addresses his remarks to the Legislature so that that august body "may understand the confusion which has been caused by the present state of the statutes". There is no doubt that there is confusion. It seems that the best solution of the problem is for the Legislature to take such action as to recognize the peculiar status of an apartment house and its improvements and specifically include such within §67, Personal Property Laws, and still allow the Court to maintain its general line of demarcation between realty and personalty. This will preserve the rules

of property the court feels it should enforce and at the same time will do what §67, Personal Property Laws was partly intended to do,- protect the purchaser of realty as to chattels so affixed as to appear to be part of the realty itself, a part of a completed unit.

Harold R. Altus

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EDITOR'S NOTE:

In Fay v. Witte (262 N.Y. 215) the Court of Appeals in reversing the Appellate Division held that the words "without recourse", or words of similar import, must be added after the signature to qualify an indorsement and there is nothing in the statute (Neg. Inst. L. §68) to justify a qualification by implication. In consonance with this decision is the like conclusion reached in the LAW REVIEW, Vol. II, No. 3, pg. 95, which discussed the principles underlying the opinion of the Appellate Division.

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CRIMINAL LAW - DEATH - YEAR AND A DAY

The recent case of People v Legeri, (239 App. Div. 47), in holding that the common law rule that no person can be convicted of homicide where the victim does not die within a year and a day after the cause of death is administered no longer applies in this State, presents the very striking question of whether the Legislature has abrogated this rule by implication.

The rule of the English common law is that to constitute felonious homicide the death of a person receiving a mortal wound must ensue within a year and a day from the time of the infliction of the wound. (Wharton on Homicide, 3rd. p. 1048).

The rule was regarded as a matter of substance material to the issue. If the death did not ensue within the prescribed time the offense was not a felony, as the law conclusively presumed that the wound was not the cause of death, and proofs were never admitted to show to the contrary. (State v. Spadoni, 137 Wash. 684; Wharton on Homicide 3d, p. 1048).

Such is the rule in American states in prosecutions for murder and manslaughter, except in jurisdictions where it may be prescribed otherwise by statute. (State v. Orrell, 12 N.C. 139; Wharton's American Cr. Law, §1073; Louisville E. and St.Louis, R.R. v. Clarke, 152 U.S. 230).

A homicide consists of striking the fatal blow which produced the death, but it is not complete until the victim has died; therefore, when death does not immediately follow the infliction of the wound, it is necessary in describing the crime to allege when the victim died as part of the offence charged. The stroke does not make the crime. The death does not make the crime; it is the composition of the two. Death must follow within a year and a day from the stroke, the injury being the cause, or a contributing or accelerating cause. (Alderson v. State, 196 Ind. 22; Percer v. State, 118 Tenn. 765; Brockway v. State, 192 Ind. 658; State v. Orrell, 12 N.C. 139; Louisville E. and St.Louis R.R.Co.,152 U.S. 230).

The reason for the rule as set forth in Louisville E. and St. R.R.Co. v. Clarke, supra, is that if the person alleged to have been murdered die after the prescribed time, it cannot be discerned, as the law presumes whether he died of the blow or the poison, etc., or a natural death.

The question in each case thus narrows itself down to the determination of whether or not the "year and a day" rule has been abrogated, expressly or by implication, by legislation. If the Legislature of this State has so dealt with the rule, it is no longer the law in the State. (State Const. Art. 1,§16).

In People v Legeri, supra, the court holds that our Legislature has abrogated this rule, not expressly but impliedly, by reason of the way in which it has dealt with similar matters concerning the subject of homicide. In reaching its decision, the court sets forth, among other things, the fact that §22 of the Penal Code pro-

vides that no act is deemed criminal or punishable except as prescribed therein or in some other statute not repealed thereby; that §20 of the Penal Code specifies the class of persons capable of committing crimes, defines the nature of the various crimes, and the kind and nature of punishments; and the fact that the Court of Appeals has held that there is no common law crime in this State and that the definitions of crime must be sought for in the statute. (People v Knapp, 206 N.Y. 373; People v. Ingber, 248 N.Y. 302). The court then reasons that since the "year and a day rule" is not included in the definitions of the nature of homicides in various degrees it has been excluded.

For the purpose of confirming its view that the Legislature has indicated an intent to abrogate the common law rule, the court sets forth the following: "By chapter 22 of the Laws of 1787 it was provided that a willful killing by poisoning of any person shall be deemed premediated murder. By chapter 29 of the Laws of 1813 poisoning with intent to murder where death does not ensue within a year and a day was punishable with imprisonment in the State prison for a term not exceeding fourteen years. Thus willful poisoning was deemed premeditated murder in 1787, while in 1813, where death did not ensue within a year and a day, it was a crime of lesser degree.

"By chapter 22 of the Laws of 1787 one was guilty of willful murder who stabbed another, the latter having no weapon drawn or not having first struck the other who stabbed, so that the one died within six months then following. Thus a limitation of time between blow and death was determinative of the quality of the act."

"When the Legislature in 1828 enacted the Revised Statutes Part IV was stated in the title to be a consolidation and arrangement of the statutes relating to crimes and punishments. At the same session a general repealling act was passed by which chapter 22 of the Laws of 1787 and chapter 29 of the Laws of 1813 were repealed. Thus when the Legislature was compiling and consolidating the laws with reference to crime, it expressly repealed statutory rules similar to the "year and a day" rule under consideration. This indicates an intent to abrogate the rule."

While it might seem at first that this analogy is possibly a little far fetched, it can be seen very readily, in view of the provisions of our Penal Code and the decisions with reference thereto, that the reasoning is very logical and supported by the ordinary rules of interpretation. The result is further strengthened by the paucity of reference to the "year and a day" rule in cases in this State, which seems to indicate, although perhaps not very strongly, that the rule is not regarded as in force in this State.

The courts of states having a codification of the rule have not dealt with it in such a way as to indicate whether or not it was deemed necessary, in view of the statutes defining crimes and punishments therefor, to codify the rule in order to preserve it. They have done nothing more than apply the statutory rule and determine whether allegations as to time of death in the particular indictments under consideration were sufficient. (State v. Keerl, 29 Mont. 508; Roberts v. State, 17 Ariz. 159).

At least two states having statutory provisions similar to ours defining crimes and punishments have had occasion to determine whether or not the "year and a day" rule still exists in those states.

By statute in Texas "no person shall be punished for an offense which is not made penal by the plain import of the words of the law". (Pasc. Dig. art. 1611). Again, the purpose of the Texas criminal law was "to define in plain language every offense against the laws of this State, and to affix to each offense its proper punishment". (Pasc. Dig. art. 1603).

It will be seen that these provisions contain, in substance and effect, the same directions as §22 of our Penal Law. However, in Hardin v. State, (4 Tex.Cr.App. 355) the court said, "not withstanding these provisions of our criminal law, it is undeniably true that they have not altered or in anywise changed the fundamental rule of the common law that, to make the offense of murder in the first degree, it is necessary to allege and necessary to prove, the death, and that the deceased literally died within a year and a day after he received the injury of the wounds which occasioned the death."

The legislature of Indiana has enacted that "crimes and misdemeanors shall be defined, and the punishment therefor fixed by statutes of this State, and not otherwise." (Burns' 1914,§237). This again is in substance the same rule as that provided by §22 of our Penal Law. But in State v. Dailey, (191 Ind. 678) it was held that the "year and a day rule" of the common law still exists in that State, the court saying, "In this State we have no statute in contravention of the common law rule that the party must die within a year and a day after the wound is inflicted in order to make the killing either murder or manslaughter. Therefore, if by analogy we may reason from the rule that, where a statute creates a crime without defining it, the court may do so by the aid of common law definitions, then we might as readily say that the Legislature, by its silence on the subject of time between the giving of a wound and the death, intended that the common law rule of a year and a day should govern, and we so hold."

For all that appears in these cases the courts did not have to consider in their determination of the question whether or not their statutes had abrogated the common law rule, any other legislation dealing with a like rule, and in any way similar to that relied upon by the court in People v. Legeri to confirm their view that the "year and a day" rule has been excluded from the criminal law of this State, from which might be gathered a legislative intent to abrogate the rule.

Also, it may be that no court up to the present time has seen fit, to fly in the face of numerous decisions throughout the country, both in states having statutory definitions of crimes and punishments and those not having such statutes, by declaring that in their particular state the "year and a day" rule no longer exists.

However much weight either of these considerations may be entitled to, we come back to the primary proposition that the whole matter is a question of interpretation. It being such, the decision

of the court in the case under consideration is not to be weakened by the fact that the determination might well have been the other way. The result reached rests upon sound reasoning and logic not withstanding that the opposite conclusion might have been reached without running counter to any established doctrime or principle of our law.

Notwithstanding the rule that statutes abrogating the common law must be strictly construed, (Woollcott v. Shubert, 217 N.Y. 212), and that a purpose to change the common law should not be imputed unless that purpose be plainly evinced, (Brooks v. People, 49 N.Y. 436, 439), it must be borne in mind that it yields to changed conditions and circumstances (Danes v. State of New York, 219 N.Y. 67), and does not exist where it has been modified or abrogated by statute. (Gibbs v. Arras Brothers, 222 N.Y. 332). With these considerations in view it cannot be said readily that the court erred in its holding in People v. Legeri, when the provisions of the Penal Law, the decisions construing the provisions of the same and our legislation dealing with rules similar to that under consideration are considered carefully.

If the holding be attacked on the ground that any statute abrogating the common law must be strictly construed, or if anything further is needed to support the decision, the answer is that at the present time a much greater degree of certainty exists in the field of the medical profession. Changed conditions such as those to which the common law yields are present. The doubt which formerly existed, and which was the reason for the "year and a day" rule, has been removed to a great extent. It now can be determined with a much greater degree of certainty whether or not a given cause produced the death, whether the time between the alleged cause and the death be a year and a day, a purely arbitrary limitation, or a longer time.

The rule is one of those the purpose of which has long since ceased to exist.

The holding in People v. Legeri is in keeping with present conditions and in conformity with the advanced and enlightened jurisprudence of this State and should meet with affirmance.

Charles W. Aussicker

SALES - FOOD - IMPLIED WARRANTY

To the already large number of decisions relating to the liability of an innkeeper and restauranteur for the serving of unwholesome food to a customer, is added another case holding, not without some difference of opinion, that liability reposes in the field of negligence and not in contract.

The Supreme Court of Errors of Connecticut has recently decided in the case of Lynch v. Hotel Bond Co., (167 Atl. 99), Judge Haines, dissenting, that, where a customer had been made ill by unwholesome food served in the defendant's dinning room, there was no liability on the part of the defendant since negligence, imputable to him, was not shown. This case followed the ruling laid down by the same court in a previous case. (Merrill v. Hodson, 88 Conn. 314). It was there decided that when a customer entered a hotel or restaurant for food there was no sale of such. The reason for the holding reads in part as follows, "The essence of it (the placing of food before the guest) is not an agreement for the transfer of the general property of the food or drink placed at the command of the customer for the satisfaction of his desires or actually appropriated by him in the process of appeasing his appetite or thirst.... The true essence of the transaction is the service in the satisfaction of a human need or desire - ministry to a bodily want. A necessary incident of this service or ministry is the consumption of the food required. This consumption involves destruction, and nothing remains of what is consumed to which the right of property can be said to attach. Before consumption title does not pass; after consumption there remains nothing to become the subject of title. What the consumer pays for is the right to satisfy his appetite by the process of destruction."

Among other cases which substantiate this rule are: Parker v. Flint (12 Mod. 255) which states that an innkeeper does not sell his food but "utters" it to his guests; Loucks v. Morley (39 Cal. A. 570) negatives the idea of sale on the ground that where the food is placed before a customer it cannot be a sale for domestic use" and so no implied warranty. Nisky v. Childs Co. (103 N.J.L. 464) is in accordance with the same ruling that there is no implied warranty for there has been no sale of the food to the customer, (Beale on Innkeepers, §169). The court in its decision in Sheffer v. Willoughby (163 Ill. 518) refused to grant relief to the customer, but on a different ground than the lack of a sale. In stressing the question of negligence the court said, "If a person keeping a public restaurant fails to exercise ordinary care in furnishing food to his patrons, and damage results, he would be liable,.... But where an action is brought to recover damages, the burden is upon the person brining the action to establish carelessness or negligence". This argument which tends to relieve the innkeeper or restauranteur from liability as an insurer of its food is also supported by Kenney v. Wong Lew et al, (81 N.H. 427), Valeri v. Pullman Co., (D.C., 218 Fed. 519) and Travis v. Louisville & N.R. Co., (183 Ala. 415) as to food served on a dining car; by Horn & Handart Baking Co. v. Licber, (C.C.A.Pa.,25 Fed. 2nd. 449) and Bigelow v. Maine Cent. R.Co., (110 Me. 105) as to canned goods not prepared by the server.

From other courts and legal writers comes the converse and seemingly better rule as to the liability assumed by those who hold themselves out to the public as proprietors of dining rooms and restaurants.

Under modern conditions where anyone may enter a hotel dining room, whether rooms are hired or not, for the purpose of eating, there is little doubt but that the food is purchased by the customer. (Barrington v Hotel Astor, 184 A.D. 317; Heise v. Gillett, 83 Ind. A. 551; Smith v. Carlos, 215 M.A. 488).

"The purchase of a meal includes all the articles that go to make up the meal. It is wholly immaterial that no specific price is attached to these articles separately.... It would be immaterial that other articles were included in the purchase, and all were charged in one collective price", (Com. v. Worcester, 126 Mass.256; Com. v. Warren, 160 Mass. 533; as to illegal sale of partridge, Peo. v. Clair, 221 N.Y. 108; same as to quail, Com. v. Phoenix, Hotel Co., 157 Ky. 180; same as to oleomargarine, Com. ex rel Allegheny County v. Miller, 131 Pa. 118; same as to intoxicating liquor, State v. Lotti, 72 Vt. 115).

The followers of the theory that there is no sale, might well be asked two questions which grant no quarter to a negative answer. "May not one who secures and pays for a piece of pie at an 'automat' or luncheon spa take it from the plate and walk off with it without wrong"? (Williston on Sales, Vol. I. page 285). The case of Clark Restaurant Co. v. Simmons (290 Ohio Ap. 220) provides the second question, "If a glass of whisky or other liquor served to a patron is a sale why should not a beefsteak or a piece of pie served likewise for money be a sale"?

It might be well before passing to the subject of implied warranty to recall that the action brought is one on contract and that "due care is not a term of the law of contract, but of torts," (Friend v. Childs Dining Hall Co., 231 Mass. 65), and so the factor of negligence, on the part of the proprietor, is not a part of the litigation.

There is no dispute as to the liability of a retail dealer of food upon whose judgment the customer relies and who knows that the food is for human consumption, for he impliedly warrants that it is wholesome and fit for human consumption (Ward v. Atlantic & Pacific Tea Co., 231 Mass. 90; Craft v. Parker, Webb & Co., 96 Mich. 245; Copas v. Anglo-American Provision Co., 73 Mich. 541; Hoover v. Peters, 18 Mich. 51; Race v. Krum, 222 N.Y. 410). The reason for this rule is plainly stated in Wiedman v. Keller, (171 Ill. 93), where the court in part said "Where, however, articles of food are purchased from a retail dealer for immediate consumption, the consequences resulting from the purchase of an unsound article may be so serious and prove so disastrous to the health and life of the consumer, that public safety demands that there should be an implied warranty on the part of the vendor that the article sold is sound and fit for the use for which it was purchased.... in the sale of provisions the vendor has so many more facilities for ascertaining the soundness of the article offered for sale, which are not possessed by the purchaser, that it is much safer to hold

the vendor liable than it would be to comepl the purchaser to assume the risk".

Bearing this statement in mind is it not a strange inconsistency that a retail dealer should be held liable if the contents of an unopened can of food proves to be unwholesome, while a restauranteur or innkeeper who opens, prepares and serves the canned food is free from liability? (Williston on Sales, Vol. I. page 986). Surely, where a party supplies food to his patrons for either of the purposes of consuming it on the premises or carrying itaway to be consumed elsewhere, he should not be held liable upon an implied warranty in the latter case if only for his negligence in the former. (Greenwood v. Hohn R. Thompson Co., 213 Ill.A. 371).

By the relations of the parties it is inferred that the restauranteur knows the purpose for which the food is ordered and that the patron is relying upon the skill and judgment of the former in selecting and preparing the food. By accepting the order the proprietor contracts to furnish the guest with proper food and if he fails to furnish wholesome food he is liable for damages for he is "conclusively presumed to know the quality of the products he is delivering". Doyle v. Fuerst & Kraemer, (139 La. 838); Barringer v. Ocean S.S. Co., 240 Mass. 405; Race v. Krum, 222 N.Y. 410; Friends v. Childs Dining Hall Co., 231 Mass. 65; Barrington v. Hotel Astor, 184 A.D. 317; Rinaldi v. Mochican Co., 225 N.Y. 70; Temple v. Keeler, 238 N.Y. 344; Smith v. Garrish, 256 Mass. 183; Muller v. Childs Co., 185 A.D. 881).

After a study of the numerous cases on both sides of the question, of innkeeper's and restaurenteur's liability for serving unwholesome food to their guests, the statement by the court in Smith v. Carlos, (215 Mo. A. 488), seems to lay down the rule as it should be applied today. In part the court said, "The trend of times is to require eating houses to be as sanitary as possible, and to protect the public as far as can be by inspections, tests, etc. The importance of pure food to the public, and the inability of a guest to see or examine his food prior to its preparation and cooking, of necessity requires that one who holds himself out as a public furnisher of food and an expert in producing and preparing the same be held as an insurer against injury occasioned by a failure to furnish wholesome and pure food to eat".

Francis A. Bolles

PERSONAL PROPERTY - REPELVIN - SLOT MACHINES

The recent case of Young v. Sunderman (238 A.D. 817) brings to our attention two questions: First, what is a slot machine under §982 of Penal Law, second, the right to replevy from the property clerk of the police department articles siezed by the plice in performance of their duties. The strong dissenting opinion by Presiding Judge Finch to which Judge Martin concurred, impresses upon us the necessity for remedial legislation. It seems impossible to concur with this dissent because:

> "The penal law must be construed in accordance with its clear meaning, so that all who may read it may know what act is forbidden." (People v. Stoll, 242 N.Y. 435).

The case of Young v. Sunderman, supra, is an action by the plaintiff to recover possession of slot machines siezed by the New-York city police, which are now in the possession of the defendant as Acting Property Clerk of the police department. Two members of the police department entered a restaurant run by the plaintiff, saw the slot machines, and proceeded to play them. They played eight nickles in the machines and received in return about twelve brass checks which, in the absence of proof to the contrary were of no intrinsic value. They seized the machines and arrested the plaintiff for violation of §982 Penal Law. The plaintiff was discharged by the magistrate. The affirmance by the Appellate Division was without opinion and, therefore, the per curiam opinion by the Appellate Term of the Supreme Court, which allowed the plaintiff to recover the machines, is significant. Therein it was said:

> "It is only where the magistrate finds that the machine was of a character suitable for gambling purposes, and has been used by the possessor in violation of the article against gambling that he is ordered to destroy it.
>
> Under the decision of the Court of Appeals in People v. Jennings (257 N.Y. 196) possession of the instant machines does not appear to violate §982 Penal Law. If they did, they might be destroyed irrespective of the acquittal or conviction of the person arrested, § 985 Penal Law."

In the case of People v. Jennings, supra, the evidence showed that when a nickle had been dropped in the slot of the machine,for the possession of which the defendant was being tried as being in violation of §982 Penal Law, there was emitted a candy mint and one or more metal rings of no intrinsic value might also fall out according to the combinations formed upon the turn of the lever. The court was careful to point out the distinction between §982 and §970", the former being the section under which the defendant was arrested holding:

> "The former section applied to the possession of slot machines, and makes it a misdemeanor to keep or maintain a machine into which may be inserted a piece of

> money, and from which as a result may issue 'any piece or pieces of money or any check or memoranda calling for any money'. The latter §970-A applies to the sale or lease of a slot machine, and this describeds the contrivance as one from which 'may issue any piece or pieces of money, or any check or memoranda calling for any money; or any machine or device of any kind or nature by the use or operation of which there is an element of chance for the winning or losing of money or other things of value'. The words 'other things of value' do not appear in §982. Nothing of value or at least of money value came out of the machine in this case. The judgment of conviction for the violation of §982 is unsupported by the evidence and must be reversed."

We can clearly see that the machines in Young v. Sunderman, supra, and that in People v. Jennings, supra, were of the same type, both emitting tokens, which from lack of proof to the contrary are valueless, at least from a monetary standpoint. In both cases the machines were siezed as being in violation of §982. Should the fact that in one case the action is replevin, and that the other is a criminal action cause us to hold that, in the former, the machine violates the section while in the latter that it does not? Anomolies are not favored in the law and a holding of this nature would be to create one.

Conceding that regardless of the conviction or acquittal of the defendant in the criminal prosecution, the verdict does not determine the character of the machine, that even though acquitted, the machine, if found a slot machine, under § 982 Penal Law, might be destroyed under §985 Penal Law, here the machines sought to be recovered were not slot machines under §982 Penal Law.

The court of Appeals in People v. Kopper (253 N.Y. 83) have negatived the argument that the tokens emitted are in themselves "memoranda calling for money", saying:

> "We are not now passing upon a case where there is no extrinsic proof that the metal disks which may issue from the machine are understood by the possessor of the machine and those who may use it to call for money in exchange for disks. At least where that proof is supplied, possession of the machine constitutes an offense under §982 Penal Law."

The only cases throughout the United States wherein judicial notice of the fact that humans play for money and not for amusement are Harvie v. Heiss (150 S.C. 277) and Almy Mfg. Co. v. City of Chicago (202 Ill. App. 240) and these cases, besides having been decided in a foreign jurisdiction, where decided prior to the decision laid down in People v. Kopper, supra.

In the case of Lyman v. Kurtz, (166 N.Y. 274) the player of the machine was bound to receive one cigar but might receive more. The court in holding the machine a gambling apparatus, said:

> "The evidence shows the machine to be a contrivance or apparatus by which it is determined who, as between the player and the proprietor, is the winner, or loser of the money hazarded. The player stakes or hazards his money on a chance, and that is sufficient to make out gambling."

In the Young case, the argument might be set forth that the player, being able to repeat the machines on the tokens emitted, can, (and) is sure of obtaining more mints and hence the proprietor stands a chance of losing, which under Lyman v. Kurtz, supra, would be sufficient to make the machine a gambling device. Such reasoning is too round-about to be of any value and besides, the Court of Appeals, in the more recent cases, have ignored the case of Lyman v. Kurtz, supra, although it has been frequently called to their attention.

Holding these machines not in violation of §982 Penal Law is not to ignore such cases as Byk v. Enright, (240 N.Y. 699) or Triangle Mint Corp. v. Mulrooney, (257 N.Y. 200) wherein the court refused to restrain the defendant police officers from siezing alleged slot machines owned by the plaintiffs. In considering those cases it must be kept in mind that therein the court was called upon to exercise its equitable discretion and not to apply fixed principles of law to a state of facts. Neither has that part of the dissent by presiding Judge Finch been overlooked, wherein referring to the case of People v. Jennings, supra, he pointed out that the Court of Appeals said:

> "The readiness with which an innocent contrivance may be turned into a gambling device, may be relevant and competent in moving the court not to interfere with the police."

It is, nevertheless, a rule of interpretation that one is not to single out words or phrases as being the holding of the court, but is to consider them in connection with the rest of the opinion, Leifer v. Scheinman (179 A.D. 665). The quotation, supra, when read in connection with the rest of the paragraph from which it was taken shows that the court was then speaking of giving equitable relief by way of injunction.

In considering the second question presented by Young v Sunderman, supra, e.g., the right to replevin property from the police, we are to bear in mind that the machines in question do not seem to be condemmed by §982 Penal Law. There is nothing in the Civil Practice Act which prohibits the plaintiff from maintaining such an action. There is no provision in the code of criminal procedure which prohibits the return of property siezed.

In the case of Lynch v. St.John (56 How.Pr. 141) the contention of the defendant was that the defendant being the property clerk of the police department and the property in custody of the law (that) no action of replevin would lie at the suit of anyone to take it out of his possession. The court held that the property clerk of the police department has no right to retain property from its rightful owner after the prosecution which gave rise to

his possession has ceased; and in case of replevin proceedings he must, like any other public officer, obey the lawful order and process of the court.

In the case of Simpson v. St.John (93 N.Y. 363) the defendant held property in the capacity of property agent of the police department. The property was held for the purpose of using it as evidence against one Harris, who was charged with obtaining property on false pretenses. The court held that it could not be replevied from the custody of the law until that custody was ended by a conviction or acquittal, or by an order of the magistrate permitting a surrender to the owner. A similar state of facts appeared in Mugan v. Tracy (220 App.Div. 600) and the court refused to allow the plaintiff to recover, but it must be borne in mind that in these cases the property sought to be recovered was to be used as evidence in a criminal prosecution, whereas, in Young v. Sunderman, supra, the prosecution had ended.

In Triangle Mint Corp. v. Horgan (133 Misc. 802) the plaintiff was the lessor of machines similar to those in the Young v. Sunderman, supra, case. The lessees were acquitted of the charge of violation of §982 Penal Law. The plaintiff sought to recover possession from the defendant who was the property clerk of the police department. The court refused to allow the plaintiff to recover possession of them, saying they were still in the lawful possession of the defendant, holding:

> "In other words, it must be borne in mind that the prosecution in such cases has a twofold purpose: to enforce the statutes against gambling apparatus, and in addition to enforce the penalty against persons having possession of it; therefore, a prosecution cannot be said to have ended by a mere discharge of a person in whose possession gambling apparatus was found. Continuation of the prosecution may go on to the end that the articles charged to be unlawful may be confiscated and destroyed if found to violate the law; therefore the property clerk may hold these machines in furtherance of the prosecutions and the law's ultimate disposition."

This case, however, is distinguishable in many respects from Young v. Sunderman, supra. In the Young case, the plaintiff was not a lessor attempting to recover the machines. He was the owner. In the Triangle Mint Corp. case the plaintiff was the lessor, therefore, §970A instead of 982 is applicable and as pointed out supra the machines violate §970A Penal Law. Therefore, the machines sought to be recovered in the latter case were unlawful where in the former case they were lawful. In the latter case, they could be destroyed under §985 Penal Law, whereas in the former they could not. Since they could not be legally destroyed, there could be "no continuation of the prosecution to the end that the articles charged to be unlawful may be confiscated", hence the defendant's right to possession of them had ended.

The plaintiff in Young v. Sunderman, supra, should recover, since the machines were not illegal under §982 Penal Law, and since replevin will be against a property clerk of a police department where his right to possession of the articles sought to be replevied has ceased, as here it had.

Harry J. Bartle

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EDITOR'S NOTE:

In Gostkowski v. Roman Catholic Church (262 N.Y. 320) the Court of Appeals affirmed the opinion of the Appellate Division that a shusband has the right to protect the remains of his deceased wife and may recover money damages for arbitrary interference with the body after interment; and that in the absence of neglect to exercise it the surviving spouse has the sole right to sue, during his or her lifetime, for such damages. The existence of such a right was asserted in the LAW REVIEW, Vol. II, No.4, pg. 122, wherein were reviewed the cases which underlay the opinion of the Appellate Division.

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FRAUD IN RELATION TO THE MARRIAGE CONTRACT

Just what are the remedies of a person who has been tricked or duped into a marriage by the fraud of another has long been the subject of judicial controversy and legislative passiveness. The contractual aspects of this civil contract involving the most sacred relation of life has been jealously guarded by the courts of this state. They injury inflicted by the fraud in relation to such contracts is not merely pecuniary in nature, but one which may result in a serious and permanent wrong to the man or woman's existence in this life. It is for this reason that public policy demands there should be adequate remedies against such a wrongdoer and the least fraud in connection therewith be the subject of judicial cognizance.

A recent case decided by the New York Court of Appeals in Leventhal v. Liberman,(262 N.Y. 209), presents a new angle as to the remedies available to a person who has been the victim of fraud in relation to the marriage contract. In this case Bernice Leventhal and Abraham Liberman were married. Four years latter she had the marriage annulled becuase of the fraud of her husband, his father and sister in representing that he was in good health and of clean habits when in truth he was tubercular and a drug addict. She now brings this action against the father and sister to recover damages for their fraud. The court held that the fraud having been established she could recover against the father and sister even though she had the marriage contract with her husband annulled and that the doctrine of election of remedies did not apply. That the decree of annullment did not wipe out the injury inflicted and those causing it should be liable in damages for their tort.

It was the strong contention of the defendants that the plaintiff, having annulled the marriage contract, had a full and complete remedy and that she is now bound by such election and cannot recover in this action for damages for their fraud. The question is whether she is estopped by her election in bringing the action for annulment. It is apparent that to apply such a doctrine of election of remedies would be inequitable and unjust under these circumstances since under the principle of Schubert v. Schubert Wagon Co.,(249 N.Y. 25), she might not be able to recover damages from her husband for his fraud. However, besides appearing unjust, the following cases will bear out the holding of the court that the election of this remedy of annulment is not conclusive as to the plaintiff bringing this action for the fraud.

That an action against third parties for fraud in inducing one to marry another may be maintained has been decided in Piper v. Hoard,(107 N.Y. 73);Kupeck v. Goldman,(150 N.Y. 176):Abraham v. Abrahams,(246 N.Y. 611). In none of these cases had the marriage previously been annulled by the plaintiff while in the Leventhal case the marriage contract had been repudiated. Professor Bigelow in his discussion of election of remedies offers an explanation as to these two remedies. A contract founded upon a false and fraudulent representation, though not amounting to a warranty, may be re-

pudiated, and an action for tort maintained; or the contract may be treated by the injured party as binding, and an action for tort brought to recover damages for the loss caused by getting him into the contract.

Where a woman is induced by fraud and deceit to enter into a void marriage, she may recover damages for such tort without first having the marriage annulled. Nelson on Divorce and Separation, §1023.

A party may prosecute as many remedies as he legally has provided they are consistent and concurrent. Morgan v. Skidmore, (55 Barb. 265); Witney v. Allaire, (1 N.Y. 312). Was the action for annulment inconsistent with this action for the tort? The action for annulment proceeded on the theory of rescission of the marriage contract as distinguished from an action for divorce which proceeds on the theory of the affirmance and validity of marriage. (Schouler on Marriage, Divorce, and Domestic Relations, Vol. 2, §14). So also did this action in the Leventhal case proceed to recover damages for the fraud after the marriage contract had been repudiated or rescinded. In the annulment action relief was given as to the future while in this action for fraud the damages are recovered for past suffering and injury caused by the tort. They are truly consistent and concurrent remedies. The Court of Appeals cited the following three cases as authority that the remedies are concurrent and that doctrine of election of remedies did not apply. (Bowen v. v. Mandeville, 95 N.Y. 237; Powers v. Benedict, 88 N.Y. 605; Frey v. Torrey, 175 N.Y. 501). The first of these will serve as an illustration. In that case one Bowen sought to recover damages for the fraud of the defendant on the sale and guaranty of payment by him to Bowen of a bond and mortgage. It appeared plaintiff had previously recovered judgments against defendant upon his guaranty for each of the first two installments of the bond, but no part of the judgments were recovered before plaintiff commenced this action for fraud to recover damages to the full amount of the securities. Defendant claimed the plaintiff had elected his remedy by bringing this prior action. The court held all the actions had proceeded on the theory of affirmance of the contract of sale and that they were concurrent and consistent remedies. So in the Leventhal case both actions proceeded on the theory of recission and were not based on irreconcilable theories.

In American Surety Co. v. Conner, (251 N.Y. 1), the creditor of defendant husband was suing her to recover jewelry and land conveyed to her by the husband in consideration of her marriage to him. The creditor claimed that the wife having had the marriage annulled there was a failure of consideration for the transfer. The court held that husband had enjoyed the society of the woman with opportunity of offspring and it was impossible to place the woman in the condition she would have been but for her performance of the contract. That the decree of annulment destroyed the marriage from the beginning as a source of rights and duties, but it could not obliterate the past and make events unreal. What it ended was a status or relation, the grounds for terminating which are fixed by law for the welfare of society. The wife did not have to retrun the benefits which she had received as a condition precedent to her obtaining this annulment as that was the impossible. Gains there had been and losses beyond appraisal. Thus, as shown by this case, the annulment

which made the marriage void ab initio, did not destroy a valuable contract right she possessed against her husband in which the consideration on her part was the marriage to the husband. By analogy then the annulment of marriage in the Leventhal case did not not destroy her right of a course of action for fraud against the father and sister as the law did not condition the annulment upon her giving up the rights and benefits she had received under the marriage contract.

One who does not know what to restore to another may not insist upon restitution to himself if it is his own guilt and not the other's that has engendered the confusion. (Ring v. Ring, 127 A.D. 411). The wrongdoer will be left in the toils of his duplicity. (Hammond v. Pennock, 61 N.Y. 145; Butler v. Prentice, 158 N.Y. 49; Heckscher v. Edenborn, 203 N.Y. 210).

Ogden v. McHugh, (167 Mass. 276), is a case where a man conveyed property to his wife in fullfillment of an ante-nuptial contract. After his death it was found that the woman's first husband, who had been thought to be dead, was alive, so that the second marriage was a nullity. The heirs brought suit to set aside the conveyance. The holding was that the wife might retain what she had received. It was impossible, the court said, to place her in the condition in which she would have been but for the acts she had done in the performance of the contract. It would be unjust in such circumstances to take back what had been given. Other cases in point are: (De Hierapolis v. Reilly, 168 N.Y. 585; Galuska v. Galuska, 116 N.Y. 645).

There is still another line of cases that tend to show that by the annulment of the marriage contract the person does not lose his cause of action for fraud. It is sound law both in this state and foreign jurisdictions that a woman, who is deceived into entering into a void marriage with a man already married, may maintain an action against him or third persons for the fraud. (Blossom v. Barret, 37 N.Y. 434; Manville v. Palmer, 68 Vt. 1; Sears v. Weyner, 150 Mich. 388; Buckley v. Buckley, 50 Wash. 213). In these cases the marriage contract entered into by the parties was absolutely void because of a prior husband or wife living - still the cause of action for fraud against the husband and third parties remained despite the marriage contract being void. In re. Payne's Appeal, (65 Conn. 397), where a man was fraudulently induced to marry a woman who already had a husband; the court said the deception by which a married woman induces a man to falsely assume and maintain the status of her husband is an injury to the person complete with the consummation of the void marriage. In the Leventhal case the annulment made the marriage void ab initio. Therefore, there is no reason why the action for the fraud of the third persons should be lost because the party has had the marriage made void by the annulment than where the law did so because of a first husband or wife was living. If the action for the fraud remained in one case it should in the other also.

Cooley on Torts, §177, adds further light on this subject. A very serious wrong may be accomplsihed by inducing ones through fraud and misrepresentation to enter into an illegal marriage. Known im-

potency on the part of the man, it would seem must be a fraud on the marriage, and being with child by another man at the time of the marriage, and not disclosing the fact would be a like fraud in the woman. For these the marriage might be annulled by a competent court, but they afford no ground for an action at common law by one spouse against eh other. But in such case an action for damages will lie against a third party who is a party to the fraud.

From these anuthorities it is evident that annulment of the marriage contract did not place him in status quo and there is no principle of law which prevents him from thereafter maintaining an action to recover for the injury caused by the tort. Thus the doctrine of election of remedies; as defined in Clark v. Kirby, (243 N.Y. ___), does not apply to this case. The plaintiff annulled her marriage because of the husband's fraud but the decree did not wipe out the past effects upon her. The injury was very real, and those causing it should be made to pay the damages. Their acts have the same legal result when inducing marriage as when inducing any other change in position through fraud and fraudulent representations. The result is to make the third party liable for the damge sustained whether there has been no annulment or whether, as in this case, such partial relief has been afforded. The plaintiff had become a married woman and had suffered humiliation following the discovery of her husband's condition. She had felt the disgrace of her situation; all of which are matters which the law takes into consideration when trying in this rather crude way to measure the damages in money. Therefore plaintiff had the right to annul her marriage and bring this action to recover damages for the fraud of the defendants as consistent and concurrent remedies.

Mattihas S. Fallis

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TRENDS IN TAXATION AS INDICATED BY THE OPINIONS OF THE SUPREME COURT OF THE UNITED STATES.

By
Charles J. Tobin, L. L. D.

Editor's Note:

Mr. Tobin, former counsel to the State Tax Commission and former President of the New York State Tax Association, is Lecturer on the law of Assessment and Taxation at Albany Law School. The importance of the following article which he has graciously contributed is equalled only by the experience and authority with which Mr. Tobin can speak.

Of recent years the pressure of increasing taxation has been a familiar political and economic phenomenon. In the field of the law the changes which have been taking place have been correspondingly reflected, until today the subject has become one of outstanding importance to the legal practitioner as well as to the theorist. This development is illustrated in an interesting fashion in the work of the Supreme Court of the United States. Going back to its 1910 term for example, of all cases decided in which opinions were written, approximately 9% involved questions of taxation. At the 1920 term about 15% related to this topic. Within the last dozen years this percentage has doubled, and during the 1932 term 31% of all the court's opinions involved tax problems.

The lower federal courts and the state courts also have been increasingly concerned with matters of taxation. The result is a welter of decisions during the course of a year. To review these decisions is a large undertaking. Obviously it is impossible in a single paper to mention more than a small proportion of the total. All that can be done is to select a few which appear to be of the greater interest or importance. Most of those chosen will be cases decided by the United States Supreme Court. The period covered will be, in general, that of its last term, beginning October, 1932.

In surveying the output of the court during this period, one is impressed more by its mass than by novelty or unusual change. There is nothing comparable, for instance, to the revolutionary developments of the preceding few years, with respect to the jurisdiction of the states to tax intangibles; nor comparable to the development over a slightly earlier period of the subject of constitutional limitations upon state franchise taxation. Speaking of jurisdiction, however, there is one decision which calls for mention, and it will afford a convenient starting point.

JURISDICTION.

The case of the year on this subject is Burnet v. Brooks. (288 U.S. 378). It involved the levy of a federal estate tax

upon the succession to certain property of an intangible nature belonging to a non-resident alien. The property consisted principally of securities, including bonds of foreign governments and corporations, bonds of domestic corporations, and stock in a foreign corporation. The bonds and stock certificates were in the possession of agents within the United States. As a matter of statutory construction the Supreme Court held that the property was "situated in the United States" within the language of the Revenue Act and hence taxable according to its terms. (Revenue Act of 1924, Sec. 303). The question then arose of whether the tax was constitutional. It is apparent that the only basis of jurisdiction lay in the physical presence of the securities in this country, plus, in the case of the domestic obligations, the local domicile of the debtor corporations. It is also apparent, under the recent and familiar decisions of the Supreme Court with respect to state taxation,- (Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204 (1930); Baldwin v. Missouri, 281 U. S.586 (1930); Beidler v. South Carolina Tax Commission, 282 U. S. 1 (1930); First National Bank v. Maine, 284 U. S. 312 (1930) - that no state could levy an inheritance tax upon the property. For state purposes the only taxable situs would beaat the domicile of the owner. The issue is whether the limitations imposed upon the states by the due process clause of the Fourteenth Amendment apply also to the Federal Government, under the due process clause of the Fifth Amendment. The court held not. This result was foreshadowed by earlier decisions, - (United States v. Bennett 232 U. S. 299 (1914); DeGanay v. Lederer, 250 U. S. 376 (1919) - but these antedated the late cases as to state taxation and were decided at a time when there was strong authority to support even a state tax upon the property in question. Hence prior to the decision nowunder discussion it has been regarded as doubtful whether a federal tax would be deemed constitutional under such circumstances as this. Burnet v. Brooks is important in removing this doubt and making clear that the jurisdiction of the Federal Government to tax is not subject to the limitations which have been imposed upon the states. The courtapproached the iseue from the point of view of international law, and pointed out that so far as international relations were concerned, ample justification for the exercise of jurisdiction was present. (Note (1933) 33 Columbia Law Rev.925 and Note (1933) 42 Yale L.J. 1277).

CLASSIFICATION AND UNIFORMITY.

Another fundamental constitutional limitation consists in the requirement of uniformity of taxation. This is imposed by the equal protection clause of the Fourteenth Amendment to the Federal Constitution, as well as by specific provisions in various state constitutions. On this topic there have been several note-worthy decisions.

In Williams v. City of Baltimore,(289 U.S. 36 (1933), the United States Supreme Court had before it the question of the constitutionality of a Maryland statute which exempted from taxation for two years the property of a specific railroad (the WASHINGTON, BALTIMORE and ANNAPOLIS ELECTRIC RAILROAD CO.).

The case came up from the federal circuit court of appeals, which had held the statute unconstitutional. (61 F. (2d) 374 (1932). In its opinion the circuit court had followed the routine lineoof argument that while the constitution permits the classification of property for the purpose of taxation, such classification must be reasonable, not arbitrary, and all persons similarly circumstanced must be treated alike. Here, it said, there was no classification, but an arbitrary exemption was granted to a single taxpayer. Even the further fact that the favored railroad was insolvent was not regarded as sufficient to alleviate the difficulty, since, in order to have a proper classification, the exemption should at least have been extended to other insolvent railroads. This holding was reversed by the Supreme Court. For reasons not of present interest, the court did not consider the Federal Constitution at all, but decided the case under the uniformity clause of the state constitution. There is no reason, however, to believe that the same result would not have been reached under either constitution. Making a realistic approach to the problem, the court viewed the situation not as to type, but in the light of its factual background. The exempted railroad did a large passenger business, supplying the only rail service between Baltimore and Annapolis, the capital of the state. Large public interests were involved in keeping its service going. Circumstances were present here which would fairly justify the legislature in treating this as a special case. Formal classification is unnecessary and an individual exemption is not arbitrary, when from the point of view of the public interest the case presents an individual problem. To quote the court:

> The public policy that made it wise in the judgment of the legislature to help this particular railroad and keep its business going may have failed altogether in respect of any other railroad, solvent or insolvent. Here was a line carrying millionsof passengers, and supplying the only railroad service between the capital of the state and its most populous city. The rescue of such a road might be dictated by the public interest when a road in some other territory might widely be abandoned to its fate. Supra, note 6, at 42-43.

The opinion, written by Mr. Justice Cardozo, is worthy of more than usual notice for its realistic treatment of the issues and for its willingness to look beyond the statement of abstract rules to consider the practical workings of the legislation under attack.

This unanimous opinion in William v. Baltimore may be contrasted with the decision of the majority of the supreme court in another case involving the troublesome problem of excise taxes on chain stores. That some discrimination against such stores is constitutional was established in 1931, when the court in State Board of Tax Commissioners v. Jackson, (283 U.S. 527 (1931), upheld by a five to four vote an Indiana statute which imposed a license fee on all stores, the amount of the fee being graduated

according to the number operated under the same management or ownership within the state. It was felt that the difference between chain stores and those operated as individual units consisted not merely in ownership, but in organization, management and type of business transacted, and that these differences were sufficient to constitute a reasonable basis of classification. This year, in Louis K. Liggett Co. v. Lee, (288 U. S. 517 (1933), the court had to determine the constitutionality of a Florida statute which likewise imposed a tax on stores graduated according to the number operated. So far as the general principle of graduation was concerned, the court reaffirmed the holding of the Jackson case. But the Florida statute involved an important additional feature - the amount of the fee per unit was dependent, not merely on the number of stores operated within the state, but also upon whether these were located exclusively in one county or in more than one county. Where all the stores were in one county, the tax per unit was less than if the same number of stores were located in several counties. The critical question was whether any reasonable basis for classification should be found in this matter of county location. By a six to three vote the court held not. The majority stated that an increase in the levy not only on a new store but on all the old stores, consequent upon the mere physical fact that the new one lay a few feet over a county line, found no foundation in reason nor in any fact of business experience. It was said further that the adoption of a county line could have no reference either to density of population, congregation of the buying public, or any other factor bearing upon the choice of a business site.

This view was opposed in a dissenting opinion by Mr. Justice Cardozo. He pointed out the classification used by the Census Bureau, according to which chain stores are divided into three groups: local, sectional and national. He then stated that there was a definite line of cleavage between local chains on the one hand and sectional and national chains on the other, based upon substantial differences, both in the business itself and in its effect upon the social organism; that these differences afforded a reasonable basis for classification, and hence that the legislature was justified in drawing a line between local chains and others. But where does the local have an end and the non-local a beginning? It was necessary to draw the line somewhere, and in drawing it with the county, the legislature, he said, acted within the bounds of reasonable discretion. In this connection he pointed out that in Florida the county is the distinctive unit of government, and that the boundaries of the county will have an approximate correspondence with the area of local business. When a chain goes beyond the county, beyond the traditional boundaries of local government, it puts the locality behind it, and elects to play for larger stakes. This point of view has a good deal of plausibility, and it is evident that the merits of the Liggett case leave ample room for debate. (See Note (1933) 33 Columbia Law Rev. 754; Note (1933) 28 Ill. Law Rev. 288; Note (1933) 81 Univ. of Pa. Law Rev. 871; Note (1932) 46 Harv. Law Rev. 155).

It may be noticed that the difference in the results reached in the Indiana and Florida cases was due to the votes of two judges - Mr. Chief Justice Hughes and Mr. Justice Roberts (the latter of whom wrote the majority opinions in both cases). Of the other seven judges, four voted to hold both statutes unconstitutional, while the other three voted in each instance in favor of constitutionality. Mention should also be made of the elaborate dissenting opinion of Mr. Justice Brandeis, who took a more extreme position than that of Jr. Justice Cardozo. (See Note (1933) 28 Ill. Law Rev. 280). He stressed the social and economic purpose of the statute, which presumably was intended to discourage the operation of the large corporation chain stores. This he thought was sufficient to justify the legislation. In this connection he reviewed the historical development of big corporations in the United States and of their legal position.

As illustrative of the normal freedom which the legislatures possess in classifying for tax purposes, reference may be made to Broad River Power Co. v. Query, (288 U. S. 178 (1933). A South Carolina statute imposed an excise on the production and sale of electric power. Claim was made that the statute denied the equal protection of the laws, contrary to the Fourteenth Amendment, in that the tax was laid upon the production of electricity by water power or steam power, while generation by the use of oil or internal combustion engines was not taxed. But the supreme court had no difficulty in finding a reasonabl basis for this classification.

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Sometimes the state legislatures are more restricted by uniformity clauses and similar provisions in state constitutions than by the Federal Constitution. This is illustrated by the fate of graduated income tax laws, which often have been overthrown because of local constitutional provisions. The prevailing conflict of authority on this question has been continued during the past year. Income tax acts have been held unconstitutional in Illinois and Tennessee, - (Bachrach v. Nelson, 349 Ill. 579, 182 N. E. 909 (1932); Evans v. McCabe, 164 Tenn. 672, 52 S.W. (2d) 159, 617 (1933). See Note (1932) 46 Harv. Law Rev.339) - but upheld as constitutional in Missouri and Idaho. (Bacon v. Ranson, 56 S. W. (2d) 786 (1932); Diefendorf v. Gallet, 51 Ida. 619, 10 Pac. (2d) 307 (1932).

FEDERAL AND STATE INSTRUMENTALITIES.

The reason why national banks are subjected to state taxation only so far as Congress permits is of course that such banks are deemed to be an instrumentality of the Federal Government. And as the result of an implied limitation of the constitution, federal instrumentalities or agencies possess an immunity from state taxation. Conversely, the instrumentalities of the states enjoy a constitutional immunity from federal taxation. The extent of these immunities has been charted by the supreme court in an extensive line of decisions, dating back to M'Cullock v. Maryland (4 Wheat. 316 (1819), in 1819. During one period there was a tendency to enforce these reciprocal exemptions according to

rigid and mechanical standards, with little regard to the actual effect that might be produced upon the government whose instrumentality was sought to be taxed. This tendency reached its peak in such decisions as Long v. Rockwood, (277 U. S. 142 (1928), in 1928, when the Supreme Court held that a state could not constitutionally tax income received by a citizen as royalties for the use of patents issued to him by the United States. Within the last five years, however, the tide has been turning the other way. The emphasis now is being placed upon the conception that the principle of immunity "has its inherent limitations". (Hughes, C.J., in Fox Films Corp. v. Doyal, 286 U. S. 123 at 128 (1932). Willcuts v. Bunn, 282 U. S. 216 (1931); Educational Films Corp. v. Ward, 282 U. S. 379 (1931), limiting the effect of Macallen Co. v. Massachusetts, 279 U. S. 620 (1929). Technical interference by one government with the other is not enough, but the tax will be judged in the light of its practical effects. Immunity will not exist where no direct burden is laid upon the governmental instrumentality and there is only a remote, if any, influence upon the exercise of the functions of government. Thus the supreme court at its 1931 term expressly overruled the patent case, Long v. Rockwood, just four years after it had been decided. (Fox Films Corp. v. Doyal, supra, note 22.)

In line with this late tendency it is significant that of four cases before the court during the 1932 term in which the imposition of a tax was attacked on this general ground, the decision in each instance denied the immunity sought. Two of these cases were clear enough. Broad River Power Co. v. Query, (supra, note 13), (already mentioned in another connection) involved a state excise on the production and sale of electric power. A power company claimed immunity upon the ground that it was generating current at a water power plant which was constructed and was being operated pursuant to a license granted by the federal water power act and hence the tax was upon a federal agency. The argument is unsubstantial. The tax is not upon the exertion of and cannot be said to burden any governmental function.

In Board of Trustees of the University of Illinois v. United States, (289 U. S. 48 (1933), See Note (1933) 33 Columbia Law Rev. 913), federal customs had been exacted upon scientific apparatus imported by a state university for use in one of its education departments. The university insisted that as an instrumentality of the state, and discharging a governmental function, it was entitled to import the articles duty-free. But the court pointed out that the levy of tariff duties by Congress is attributable not only to the taxing power but also to the power of the Federal Government to regulate foreign commerce. Whether certain specific duties should be allocated to the one power or the other is a matter of policy which it is not the function of the judicial department to determine. And so far as the regulation of foreign commerce is concerned, the federal power is complete and is exercised to the exclusion of state authority. Thus there is no violation of the principle of immunity, for there can be no encroachment on the power of the state when none exists with respect to the subject over which the federal power has been exerted.

The two remaining decisions were both concerned with mineral leases. In Burnet v. A. T. Jergins Trust, (288 U.S. 508 (1933), the city of Long Beach, California, had acquired certain lands in connection with its municipal water system. Subsequently oil was discovered in the vicinity, and the taxpayer in question obtained from the city an oil and gas lease of the lands. The agreement stipulated that the lessee should receive 60% of the proceeds of oil and gas recovered and the city 40%. The issue was whether the income derived by the lessee from the lease was subject to federal income tax. The supreme court held that it was, because the doctrine of implied immunity should be given a practical application and in the present instance the subject of the tax was so remore from any governmental function as to render the effect of the exaction inconsiderable so far as the activities of the city were concerned.

In reaching this result it was necessary to evade the authority of two earlier decisions with respect to income taxes - Gillespie v. Oklahoma, (257 U. S. 501 (1922), and Burnet v. Coronado Oil & Gas Co., (285 U. S. 393 (1932). In the Gillespie case it had been held that net income derived by a lessee from sale of his share of oil and gas received under leases of Indian lands, which in effect constituted him an instrumentality of the United States in fulfilling its duties to the Indians, could not be subjected to state income taxation. In the Coronado case the State of Oklahoma had leased school lands to a private company for the extraction of oil and gas, and it was held that profit derived from the lease by the lessee was immune from federal income tax. In the argument of the Jergins case counsel for the government sought to distinguish this latter decision on the ground that the leased land there involved had been dedicated to the furtherance of a governmental function, whereas the Long Beach land, being a part of the municipal water system, was devoted to a function which was not governmental. (Citing South Carolina v. United States, 199 U. S. 437 (1905). The supreme court, however, made no specific mention of this point of difference, but distinguished both the Coronado and Gillespie cases on the ground that in both, the burden upon the public use was more definite and direct than in the present case. It also said that in each of the earlier cases the sovereign had been acting as the trustee of an express trust with regard to the lands leased. Without making a detailed examination of the facts of those two cases, it may be said that the talk of "express trust" sounds a bit artificial. If the earlier decisions rested upon substantial grounds, there is no reason why the same policy should not control in the Long Beach case (unless for the reason that the operation of municipal waterworks is not a strictly governmental function). A court anxious to limit but unwilling to overrule a past decision can always find grounds for distinguishing it; and when such a decision is restricted by later cases to its precise facts, it is safe to say that as an embodiment of legal principle its vitality is feeble.

The same difficulty of distinguishing earlier decisions was presented in the other mineral lease case decided by the supreme court during its last term - Indian Territory Illuminating Oil Co. v. Board of Equalization. (288 U.S. 325 (1933). This concerned

an oil and gas lease of Indian lands. Crude oil, extracted from the land and owned by the lessee, was held in storage tanks. The question was whether this oil could validly be subjected to state ad valorem taxation. In holding the tax constitutional, the court had to distinguish Jaybird Mining Co. v. Weir. (271 U.S.609 (1926). There, an ad valorem tax upon ores mined under a lease of Indian land was held to be invalid. The only distinction in fact between the two cases was that in the Jaybird case the ore was still on the leased land and the lessee's portion had not yet been segregated from the share belonging to the Indians; whereas in the Indian Territory Co. case the Indians had received their share in full and the lessee's oil had been removed, commingled with other oil and was stored in the lessee's own tanks. These factual differences were held to justify a different result, but again one may suggest that if the court had felt that the Jaybird decision had much life to it, it would have regarded such differences as unsubstantial.

Speaking of fine distinctions it is of interest also to compare Indian Territory Illuminating Oil Co. v. Board of Equalization with the earlier case of Gillespie v. Oklahoma. Both involved oil and gas leases of Indian lands. In the latter it was held that a state may not levy an income tax upon the net income derived by the lessee from the sale of his share of the minerals extracted. In the former it was held that a state can constitutionally levy a property tax upon oil extracted from the leased land and held by the lessee. If immunity is to be determined in accordance with realities and with a view to the actual effect of the tax sought to be imposed, this comes close to being a theoretical distinction without a practical difference. The truth is that Gillespie v. Oklahoma, Burnet v. Coronado Oil & Gas Co., and Jaybird Mining Co. v. Weir, in spite of their recent dates (1922, 1932 and 1926 respectively), are all out of line with the decisions which now must be regarded as dominant. If immunity is to be tested by the practical considerations which the court has been stressing the last few years, these cases should be frankly discredited. In this connection it is of interest to note that in the Coronado case in 1932, a dissenting minority of four judges urged that the Gillespie case should be definitely overruled. (Group No. 1 Oil Corporation v. Bass, 283 U.S. 279 (1931).

Before leaving the subject of immunity, mention should also be made of the decision of the Supreme Court of California in People v. Standard Oil Co., (29 Pac. (2d) (1933), holding that the state could collect from a distributor of gasoline a tax based upon sales to the army post exchange located on the Presidio Military reservation at San Francisco. (United States v. Cordy, (58 F. (2d) 1013 (1932). The California court thought that the case was distinguishable from Panhandle Oil Co. v. Mississippi (277 U.S. 218 (1928), wherein the United States Supreme Court held that a state could not constitutionally impose a similar tax upon sales of gasoline to the United States for the use of the Coast Guard and a veterans' hospital. It was felt that the army post exchange was a cooperative organization largely engaged in business of a private nature and should not be regarded as one of those agencies through which the Federal Government directly exercises its constitutional or sovereign power.

INTERSTATE COMMERCE.

Gasoline taxes were also the subject of two cases in the United States Supreme Court involving the question of state interference with interstate commerce. The first was Nashville, Chattanooga & St. Louis Ry.Co. v. Wallace (288 U.S. 249 (1933). The situation was this: An interstate railroad purchases large quantities of gasoline outside the State of Tennessee and brings the same into that state, where it is placed in the company's own storage tanks. The gasoline is withdrawn from storage and used by the railroad as required as a source of motive power for moving its interstate trains in Tennessee and other states. A tax at the rate of two cents per gallon on this gasoline was levied by the state, under a statute imposing a privilege tax on persons carrying on the business of selling or storing or distributing gasoline within the state. On behalf of the railroad it was contended that this tax was an unconstitutional burden on interstate commerce for two reasons. First, because the tax was imposed on the gasoline while still a subject of interstate commerce in the course of transportation from points of origin outside the state to other outside points; secondly, because the tax was in effect one upon the use of the gasoline in the company's business as an interstate carrier. The court sustained the tax as against both lines of attack. As to the first point, it stated that the gasoline, upon being unloaded and stored, ceased to be a subject of transportation in interstate commerce and lost its immunity as such from state taxation. As to the second point, the tax was not one imposed upon the use of the fuel as an instrument of commerce, but on the contrary was imposed with respect to the storage and withdrawal from storage of the gasoline, which activities were completely accomplished before the interstate use began. Therefore the burden of the tax was too indirect and remote from the function of interstate commerce itself to transgress constitutional limitations.

This decision recalls the one handed down a year earlier in Eastern Air Transport, Inc. v. South Carolina Tax Commission, 285 U. S. 147 (1932), in which the supreme court upheld a state tax on the sale of gasoline as applied to gasoline purchased within the state for use in airplanes engaged in interstate transportation. Both decisions are to be contrasted with Nelson v. Kentucky, (279 U. S. 245 (1929), decided in 1929. There the same court held unconstitutional a state statute imposing a tax upon the use of gasoline, in so far as it affected gasoline purchased outside the state for use within the state as fuel upon a ferry boat engaged in interstate commerce. Thus a distinction lies between an excise based upon sale or storage or withdrawal from storage on the one hand and an excise based upon the actual use of the gasoline in an interstate vehicle on the other.

This line of distinction between valid and invalid gasoline taxes is drawn even more finely in the second of this year's decisions - Edelman v. Boening Air Transport, Inc., (289 U. S. 249 (1933), involving an excise levied by the State of Wyoming. The taxpayer was maintaining an airplane service for interstate transportation. The gasoline in question was purchased outside Wyoming, then brought into that state and used there in the taxpayer's

planes in interstate commerce. The statute imposed a license tax on wholesalers amounting to four cents per gallon on all gasoline sold or used within the state. It contained also the further provision that every person who should use any gasoline within the state upon which such tax had not been paid by any wholesaler, should himself pay a like tax. Under this latter clause the state sought to collect a tax with respect to the gasoline above mentioned, and the supreme court held that the state could constitutionally do so. At once we are confronted with the question of how this decision can be reconciled with Helson v. Kentucky. In both cases the respective statutes purported to levy a tax based on the "use" of gasoline within the state; in both also the gasoline in question was consumed as fuel in an interstate vehicle. But the Wyoming statute was rescued from the fate of the Kentucky statute by an ingenious interpretation of the word "use". In the Kentucky case, "use" meant the consumption of the fuel in the engines of the ferry boat. But as construed by the state authorities, what the Wyoming statute meant by "use" was not the consumption of gasoline in propelling the airplanes but the withdrawal of it from the storage tanks at the airport, preliminary to putting it into the planes. Thus it became possible to identify the case with Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace, instead of with Helson v. Kentucky. To make this nice distinction clear perhaps it is worth while quoting from Edelman v. Boeing Air Transport, Inc.:

> "As the statute has been administratively construed and applied, the tax is not levied upon the consumption of gasoline in furnishing motive power for respondent's interstate planes. The tax is applied to the stored gasoline as it is withdrawn from the storage tanks at the airport and placed in the planes. No tax is collected for gasoline consumed in respondent's planes, either on coming into the state or on going out. It is at the time of withdrawal alone that 'use' is measured for the purpose of the tax. The stored gasoline is deemed to be 'used' within the state and therefore subject to the tax, when it is withdrawn from the tanks....
>
> A state may validly tax the 'use' to which gasoline is put in withdrawing it from storage within the state, and placing it in the tanks of the planes, notwithstanding that its ultimate function is to generate motive power for carrying on interstate commerce. Such a tax cannot be distinguished from that considered and upheld in Nashville, Chattanooga & St. Louis Ry. v. Wallace, (supra. Ibid., 592)."

So far as Helson v. Kentucky is concerned, the tax there could not have been saved in this way, even if the state could have anticipated the need for such an interpretation of its statute. For (as the court points out in its opinion in the Edelman case) the facts there were that the Kentucky statute taxing the use of gasoline had been applied to that purchased and placed

in the tanks of the ferry boat outside the state. Hence the only possible act occurring inside the state which could afford a basis for the tax was the actual consumption in the engines.

Reviewing the whole line of cases it seems evident that except in this special case where the fuel is placed in the tanks of the vehicle outside the state, a state need have no difficulty in levying an excise based upon the gasoline consumed in these interstate vehicles. All that is necessary is for the state to take care to draft or interpret its legislation in the right way. Thus by the familiar process of limiting the force of the decision to its exact facts, the supreme court has reduced Helson v. Kentucky to a position of practical insignificance.

ELEEMOSYNARY INSTITUTIONS - CONTRACTS

THE DOCTRINE OF IMPLIED WAIVER.

A case recently decided by the Supreme Court of Michigan brings to attention most strikingly the extent to which the courts of this country, on one theory or another, have carried the rule exempting charitable institutions from liability for the negligent or other torts of their agents or servants. The decision is distinctly noteworthy when attention is paid to the apparent ease with which the Court disposes of a case having for its very basis an express agreement to perform a definite act and an absolute and unqualified failure even colorably to execute that act.

The case is Greatrex v. Evangelical Deasoness Hospital, (261 Mich. 327). The plaintiff in the case brought his wife and week old baby to the defendant, a corporation formed for non-profit pusposes, for medical care and services. A week later the wife died; the plaintiff left the baby with the defendant with the assurance that for one dollar per day the baby would receive the best of care. The daughter of one Vlemminck, at about this time, gave birth at the hospital to a child. The daughter left within a short time and the baby was left with the defendant to be cared for. Vlemminck called for it, and through the negligence of a nurse was given the Greatrex baby. She testified that she thought it was greatrex and not Vlemminck who called for the baby. The mistake was discovered when the plaintiff called and was offered the Vlemminck baby. All efforts to recover the Greatrex baby were futile, Vlemminck declaring that he had given it to passing motorists.

The plaintiff first declared on a tort count, then on an assumpsit count. He discontinued the tort count, due to the rule that a hospital, formed for non-profit pusposes and supported by the benevolence of its contributors, cannot be held liable for the torts of its agents or employees, and continued on the assumpsit count. The nurse was a registered graduate with a background of three years of hospital training before entering the employ of the defendant, approsimately three years before this occurrence, so that there was no question of negligence on the part of the defendant in employing her.

The trial judge directed a verdict for the defendant, and the Supreme Court, in affirming the judgment entered thereon, said that he correctly stated that there was no legal redress for the wrong done the plaintiff, that the great good generally accomplishe by a hospital and the private contributions given for its support should not be impaired by responsibility for the occasional lapses of employees. The Court further held that naming or labeling a count assumpsit does not make it such, when it is apparent on its face that it is one in tort, saying that there is no magic in the use of one term instead of another when the gravamen of the act complained of is the negligence or mistake of a servant of an eleemosynary institution, exempted from liability by law under these circumstances.

The Court refers to Downs v. Harper Hospital, (101 Mich.555) as authority for its holding in the case, and the leading case for the rule stated, in Michigan. That case states the reason for the rule to be that to permit recovery for the negligence of the servants of the institution would be to divertthe trust from the purpose ofor which the donor gave it. The reason behind this doctrine is that since the trustees of this fund could not by their own direct act divert it from the purpose for which it was given, it follows that the fund cannot be indirectly diverted by the tortious or negligent acts of the managers of the fund, or their employees, though such act result in damage to an innocent beneficiary. It is further said that the fact that patients who are able to pay are required to do so does not deprive such an institution of its eleemosynary character, nor permit a recovery for damages on account of the existence of contract relations, since all funds thus obtained are held upon the same trust as those which are the gift of pure benevolence.

The decisions in this country on the question are not only far from uniform, but those which agree in holding eleemosynary institutions exempt from liability for the negligence of their agents do not found the exemption on any one rule.

There are a number of cases in which the exemption is held to rest on the ground that the charitable institution was acting as an agency of sovereignty, and as such shared with it its immunity from being sued. Corbett v. St. Vincent's Industrial School (177 N.Y., 16) serves to illustrate this class of cases. In that case the plaintiff, a boy under sixteen years of age, had been committed to the defendant School, a charitable institution organized under the laws of the State to support and maintain an industrial school and asylum for the sustenance and education of male orphan children, by a police justice after a conviction of petit larceny. He was assigned to run a steam mangle in connection with the laundry work, and while operating it he was injured and permanently disabled. He based his claim on the negligence of those in charge and improperly guarded machinery. It was held that since the defendant institution was created by the State to exercise one of the functions which the State may exercise and which it may delegate to charitable institutions created under its laws, it was acting, so far as the plaintiff was concerned, as a governmental agency and as such entitled to the same immunity from liability fordamages arising from negligence that is conceded to the State itself and to all its municipal divisions.

Some of the jurisdictions which rest the immunity upon the proposition that the funds of the institution are the subject of a charitable trust and that to suffer a judgment to be recovered against it and to subject its property to the judgment would be an illegal diversion and waste of the trust estate go to the extent of holding that the non-liability is universal, that in no event is the institution liable to pay damages for injuries arising from the negligence or or other torts of its servants or agents, wither to a patient or inmate or to a third party who is an absolute stranger. Perry v. House of Refuge, 63 Md. 20; Parks v. Northwestern University, 218 Ill. 385; Fire Ins. Patrol v. Boyd, 120 Pa. St., 624).

On the other hand, in Bruce v. Central Methodist Episcopal Church (147 Mich. 230), it was held that a religious corporation is liable for injuries to one engaging in repairing its property through the negligence of its servants in furnishing an unsafe scaffolding. In holding the defendant liable, the Court reviewed Downs v. Harper Hospital (supra) and other analogous cases in which the plaintiff was a beneficiary or patient of the charitable insitution, and considered the proposition whether or not those cases exempt an institution administering a charitable trust from all liability for torts. The Court recognized the reason for the holding in those cases to be the prevention of the diversion of the trust fund by those employed in its execution, but thought the real basis of the reasoning to be contained in the following statement from the Downs case: "It certainly follows that the fund cannot be diverted by the tortious or negligent acts of the managers of the fund, or their employees, though such act result in damage to an innocent beneficiary. Those voluntarily accepting the benefit of the charity accept it upon this condition." Following the reasoning suggested by these words, the court reiterates that to pay from the trust fund damages caused by an agent's torts would oppose the purpose for which the trust was founded as well as the will of the founder, and says that it is entirely logical to say that this will must be recognized by the beneficiaries of the trust and that the benefit of the trust is extended to and accepted by them upon the implied condition that they shall recognize that will. The Court further says that by becoming beneficiaries they agree to recognize it, but that there is no ground upon which it may be held that the rights of those who are not beneficiaries of the trust can in any way be affected by the will of its founder. It is again argued that the rights of such persons are those created by the general laws, and that the duties of those administering the trust to respect those rights are also created by general laws and that to exempt either persons or property from the operation of the general laws is inconsistent with the fundamental idea of government. The Court finally concludes that the true basis of exemption from liability, except in those cases where the institution is acting as governmental agency, is the implied agreement on the part of those accepting the benefit of the trust that they will recognize the purposes for which the trust is created and hence will not hold the institution liable for the negligence of its servants - in effect an implied waiver, and that where the plaintiff is not a beneficiary of the trust and hence has not entered into any such implied agreement, the institution, being subject to the general laws of the land, cannot claim exemption from responsibility for the torts of its agents.

A case directly in line with the Bruce case was decided in this State within a comparatively short time after the latter. The case is Hordern v. Salvation Army (199 N.Y., 233), and in deciding it the Court expressly relied upon the reasoning set forth in the Bruce case. Hordern, a journeyman mechanic, was engaged by the defendant to make repairs on a boiler on the defendant's premises. He was injured through the defective

condition of a runway leading from a door in the boiler room. The Court, in holding the defendant liable for damages for the injuries sustained by the plaintiff, quotes from the opinion in the Bruce case and recognizes the proposition that non-liability in cases where the plaintiff is a beneficiary rests upon the ground of implied waiver of liability and not upon any principled non-diversion of the trust fund from the purposes for which it was created. It was further said that persons in situations like that of the plaintiff in that case bear the same relation to the defendant as they would to any other property owner on whose premises and through the fault of whose servants they are injured.

The authority of these two cases has never been questioned, and the holdings may be taken as practically conclusive that the real basis for the exemption from liability is the implied agreement which the beneficiary is held to make when he accepts the benefits of the trust fund. They have been followed by numerous cases in this and other states, all of which tend to uphold the principle that the liability of an eleemosynary institution depends upon the presence or absence of this implied agreement or contract, or, indirectly, the relation of the plaintiff to the institution from which he is seeking damages. (Phillips v. Buffalo General Hospital, 239 N.Y. 188; Runyan v. Goodrum, 147 Ark., 481; Hamburger v. Cornell University, 240 N.Y. 328; Schloendorff v. New York Hospital, 211 N.Y. 125; Taylor v. Flower Home & Hospital, 104 Ohio St. 61; McInerny v. St. Luke's Hosp. Assn., 122 Minn. 10).

In Schloendorff v. New York Hospital (supra), a leading case in this State on the subject, a second ground of non-liability is set forth, namely, that the relation of principal and agent does not exist between a charitable hospital and the physicians and nurses who serve it, but that they occupy the position of independent contractors whose services the hospital procures for the patient. The plaintiff in that case consented to an ether examination, but told the house physician that there must be no operation. While she was under the influence of ether a tumor was removed; gangrene developed in her arm necessitating the amputation of several fingers. The Court held that the hospital's exemption from liability could not rest upon implied waiver, since the plaintiff had never waived the right to recover damages for any wrong resulting from the operation, for she had forbidden the operation, but that the true ground for holding the defendant not liable was that the relation between it and its physicians was not that of master and servant.

This second ground of non-liability was applied again in Hamburger v. Cornell University (supra) in holding the defendant, a charitable institution, not liable for injuries received by the plaintiff, a student in the University, through the explosion of chemicals which had been given to her with which to conduct an experiment. It was said that professors and instructors and other members of its staff of teachers were not agents of the defendant, and that when the latter had used due care in selecting them its duty was at an end. It is to be noted, however,

that there was a finding that there had been no negligence on the part of the instructors in charge. The Court also stated that the trust fund theory has been rejected in this State, and that a hospital or university owes to patients or students whatever duty of care and diligence is attached to the relation as reasonably implicit in the nature of the undertaking and the purpose of the charity. This statement, together with the fact that no reference is made in either of the above cases to Bruce v. Central Methodist Episcopal Church (supra) and no attempt is made to explain or qualify its holding and that of those cases expressly following it as authority, would seem to be an admission of the doctrine implied waiver to be the true ground of exemption. Also, the fact that the case relied on as the basis of the theory that physicians, nurses, professors and instructors are not the agents of the institutions procuring their services, Glavin v. Thode Island Hospital (18 R.I. 411), comes from a State whose courts refused to recognize the exemption theory and held that charitable institutions were subject to the same liability as other institutions and individuals before a statute exempting them was passed in that State, considerably weakens this purported second ground of non-liability and leaves the doctrine of implied waiver as the unquestioned and most commonly adopted ground and real basis for the exemption of charitable institutions from liability for the torts of their agents and servants.

Having then, the doctrine of implied agreement on the part of the beneficiary not to hold the institution liable for the tortious acts of its agents as the basis of non-liability most generally recognized and unquestioned as the true one, and applying it to Greatrex v. Evangelical Deasoness Hospital (Supra), the holding in that case becomes even more striking than it appears at first sight. The plaintiff there alleged as the very basis of his cause of action an agreement made between him and the defendant that for a stipulated consideration the defendant would give his child the best of care. As part of the consideration for the plaintiff's agreement and as a natural incident of the agreement to care for the child, the Hospital must have impliedly agreed to deliver to the plaintiff his child when he should call for it. The defendant failed to perform its agreement. By giving the plaintiff's child to another it not only failed to keep its agreement to give to it the best of care, but made it impossible for it to deliver the child to the plaintiff as well. Having made such an agreement with the defendand, it is difficult indeed to understand how the plaintiff may be held to have impliedly contracted at the same time that he would not hold the Hospital liable for the negligent acts of its servants which would result in his child being lost to him forever. When the defendant agreed to care for the plaintiff's baby and deliver it to him and he in turn agreed to pay a stipulated fee per diem, it is next to impossible to say that the plaintiff also impliedly agreed that he would not hold the Hospital responsible for the torts of its servants, at least in so far as those acts would constitute a breach of the defendant's agreement to return the child to the plaintiff, and most certainly in so far as those acts would render it impossible for the defendant to keep its agreement and the plaintiff ever to get his child.

Without considering what the situation would be if the plaintiff had made an express contract by the terms of which he himself was to be cared for and had been injured in person through the negligence of the servants of the Hospital, it certainly seems that when he has made a definite agreement by the terms of which the defendant is to care for something belonging to him and to return it to him and unqualifiedly fails to do so, the Court, in holding that he has no remedy, most emphatically ignores all well-recognized principles of contract law for the purpose of extending the exemption from liability of charitable institutions beyond the bounds which the theory upon which it rests authorizes, and for the purpose of setting up such institutions as entities exempt from the operation of the general laws to an extent far greater than either their nature or their purpose warrants. For to hold the defendant not liable, it must be said that the plaintiff impliedly agreed to accept the benefits of the trust fund which the defendant was administering upon the terms and conditions upon which and with a full view of the purposes for which that fund was created, since it is generally recognized that such implied agreement is the real basis upon which charitable institutions may be exempted from liability for the tortious acts of their servants.

In this connection it may be well to examine a case which was decided in this State before the question at hand had reached its present position of importance. The case is Ward v. St. Vincent's Hospital (39 A. D., 624). There the plaintiff sued for damages because of the breach of an express contract whereby the defendant was to furnish her a skilled and trained nurse. The Court recognized the breach of contract as the gravamen of the action, and held that the contract settled all questions of general duty attached by law and became the criterion of the defendant's specific duty in the case, and that for a breach of its duty as defined by that contract the defendant was to be held liable. Although the defendant was a charitable hospital, it had what was called its "pay" side for people paying the full price, to which latter class the plaintiff belonged. However, it was not intimated that this "pay" side was a distinct unit apart from the Hospital as such, or that it took the case out of the general rule that the fact that a patient pays for the services rendered does not alter the charitable character of the institution or make it more amenable to liability for the acts of its servants and agents. So far as appears, the decision in this case has never been questioned, and it would seem that it may be taken as indicative of the attitude of the courts toward charitable institutions, at least in so far as their express contracts to render services are concerned, before the attempt to exempt them from liability and to set them up as entities in some respects beyond the reach of the general rules of law and justice became as widespread as it seems to be at the present time.

However, much weight is to be given to the Ward case, and to whatever extent the holding was influenced by the particular facts in the case, it at least recognizes the rule that when a party contracts to do something the other party to the agreement is entitled to the benefit of the terms and liabilities imposed by the contract, and that is just what the Greatrex case does not do. Although much may be said for the contention that a person should not be allowed to circumvent the doctrine of implied waiver by a contract for the rendition of services to and the care of himself, when one makes a contract by which the institution is to do a certain specific act, such as caring for a person's child, and delivering it to him, it seems to be running counter to all principles of law and justice to hold that he has agreed not to hold the other party responsible for the acts of its agents when those acts directly breach the agreement; and that he may not have the benefit of his agreement as defining the duties and obligations of the parties. The holding in the Greatrex case not only says in effect that a person in the plaintiff's situation may not have the benefit of any agreement he may make for a good consideration with an eleemosynary institution, but in effect establishes such institution as an active and acting entity which, however gross its negligence or glaring its breach of duty, is beyond the reach of the operation of the general laws which, according to all principles and ideas of government, are applicable to all persons and entities, no matter what their nature or the purposes of their existence.

CHARLES W. AUSSICKER.

REAL PROPERTY

BREAKING THE CHAIN OF ASSUMPTION OF MORTGAGES IN DEEDS.

The case of Citizens Savings & Loan Soc. v. Chapman (Wash.) 24 P 2nd 63) brings to our attention the conflict which exists in the different American jurisdictions concerning the liability of a subsequent grantee of mortgaged property, who has assumed and agreed to pay the mortgage, where his grantor or one in his chain of title from the mortgagor was not personally liable to the mortgagee. In Colorado, Illinois, Iowa, Missouri, Nebraska, North Dakota, Ohio, Pennsylvania, South Carolina, Tennessee, Utah, Washington and Wisconsin, the grantee who assumes the mortgage is liable on his assumption agreement independently of the liability or absence of liability of his grantor. In California, Kansas, Minnesota, New Jersey, New York, Oregon, South Dakota, Virginia and the District of Columbia a subsequent grantee is not liable on his assumption agreement if some one in his chain of title from the original mortgagor did not assume the mortgage or otherwise become personally liable for it.

By the common law of England, in the absence of novation, the mortgagee obtained no cause of action against the grantee of the property who assumed the mortgage agreeing to pay it and who failed to fulfill his agreement. It was considered that his promise to pay was primarily for the benefit of the mortgagor, e.g. by relieving him from the liability to pay the mortgage, and that he alone had the right to enforce that promise. This was the rule because at common law privity of contract is essential to the maintenance of an action of assumpsit. (Bonner v. Lottenham Soc. 1899 1 QB. 161; Barry v. Harding, 1 Jones & Lat.475; Oxford v. Rodney, 14 Ves. 417).

This common law doctrine has been adhered bo by the courts of Massachusetts. In Mellen v. Whipple, (67 Mass., 1 Gray, 317) it was held that the mortgagee had no right to enforce a promise made to the vendor by the purchaser of the equity of redemption to assume and cancel the mortgage which was a lien on the premises. The reason given for this holding was that there must be privity of contract between the plaintiff and the defendant in order to render the defendant liable in an action by the plaintiff on the contract, which privity was absent here.

In Citizens Savings & Loan Soc. v. Chapman (Wash., ; 24 P. 2nd 63) the plaintiff was seeking a judgment which would hold the defendants Wood and Peterson personally liable for any deficiency which might result on foreclosure. It appeared that the grantor of these defendants was not personally bound to pay the mortgage as he had not assumed the mortgage nor in any way made himself so liable. The court in granting the plaintiff the relief sought, said:

"The law is well settled in this state in accordance with the well-nigh universal rule that a grantee of mortgaged property who assumes the debt becomes personally bound and may be held at the suit of the mortgagee for any deficiency. And it is no defense that an intermediate grantee has not assumed. This is upon the theory of contract for the benefit of a third party".

The case of Hebrican v. Chamberlain, (82 Wash. 556; 144 P. 717) was an action by the plaintiff, mortgagee, to foreclose a mortgage and recover a deficiency judgment against the subsequent purchasers of the mortgaged premises who had assumed the debt. The appellant Chamberlain advanced the claim that a grantee of mortgaged premises, taking through mesne conveyances, and whose immediate deed contains a clause by which in terms he assumes and agrees to pay the mortgage, cannot be held personally liable for any debt or deficiency arising on foreclosure where any prior grantee in the chain of mesne conveyances did not assume the mortgage. The Court rejected this claim for two reasons: first, because it did not affirmatively appear that there was in fact any gap in the assumptions in the chain of mesne conveyances through which the appellant claimed; and, secondly, because the deed to the appellant in which it is affirmatively found that he did expressly assume the mortgage imports a consideration for the promise.

In Cockrell v. Poe, (100 Wash. 625; 171 P. 522), which was an action to foreclose a mortgage and recover a deficiency judgment, it appeared that the defendant Poe mortgaged the premises to the plaintiff; that through various mesne conveyances the property came to the appellant Burke who assumed and agreed to pay the mortgage. Burke contended that, in view of the fact that his immediate grantor was not liable to a deficiency judgment and had not assumed and agreed to pay the mortgage, that he was not liable for a deficiency judgment on his assumption agreement. The court awarded the plaintiff a deficiency judgment against the appellant on the ground that the beneficiary of a new promise, made between two other parties for his benefit, creating a liability on the part of the promisor to pay the beneficiary of the promise in the event, can maintain an action and recover, irrespective of any debt due from the promisor to such beneficiary. The court in the opinion cited the case of McDonald v. Tinseth, (32 N.D. 40[illegible]; 115 N.W. 863) remarking that the authorities had been therein collated and that the better reasoning sustained the principle therein adopted.

The McDonald case, supra, was an action to foreclose a mortgage and recover deficiency judgment. The mortgage had been executed by one Woodbury who sold the premises to one Engle who did not assume and from whom the defendant Finseth, who assumed the mortgage, claimed title. Finseth claimed that he could not be held liable for a deficiency judgment since there was no privity of contract between himself and the plaintiff, mortgagee, The court after citing both principles and referring to the rule which holds that the chain must het be broken said:

> "We believe however that the cases mentioned are unsound in principle, and prefer to follow the other line of authorities which appear to use to express the better rule. The cases cited by the defendant, indeed, seem to totally ignore, in their conclusion at any rate, even if not in reasoning, the well established rule of law that where one makes a promise to another for the benefit of a third person, such third person can maintain an action upon the promise even though the consideration does not run directly from him and even though at the time he knew nothing of the promise to pay him'.

It is to be note, however, that there is a statute in North Dakota to the effect that a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind. (Sec. 3840 R.C. 1895).

In Federal Land Bank of Spokane v. Miller (155 Wash. 472; 284 P. 757), the defendant Miller purchased the property from the defendant Beechtold and assumed the mortgage. The court awarded the plaintiff a deficiency judgment against Miller on the ground that his promise was for the benefit of the plaintiff and enforceable by him.

Before the case of Lawrence v. Fox, (20 N.Y. 268), was decided, in New York State, with the exception of a few scattered cases a third party had no right of action directly against the promisor on the promise, which was for his benefit, by the promise. In Lawrence v. Fox, supra, one Holly loaned $300 to the defendant on his promise to pay it to the plaintiff to whom Holly was indebted in a like sum. The court in holding for the plaintiff laid down the rule that an action lies on a promise made by the defendant upon a valid consideration to a third person for the benefit of the plaintiff, although the plaintiff was not privy to the consideration. This case has been cited and the doctrine applied in many cases but the farthest it has been extended has been the case where there was at least a moral duty owing the beneficiary from the promise.

Prior to the time of Lawrence v. Fox, supra, in actions to foreclose a mortgage and recover a deficiency judgment against one who had assumed the mortgage, the right to a personal judgment was not based upon the notion of a direct contract between the grantee and the holder of the mortgage. The principle upon which it was given, as was laid down in Holsey v. Reed, (9 Paige 446), was that the undertaking of the grantee to pay off the incumbrance is collateral security acquired by the mortgagor which innures by an equitable subrogation to the mortgagee.

In King v. Whitely (10 Paige 465), where Whitely had assumed a mortgage, his grantor not being personally liable, the court held that Whitely was not liable for the deficiency arising on

foreclosure because his grantor was not so liable. The court said, however, that if the grantor in the conveyance had been liable for the payment of the debt, the holder of the mortgage would have been in equity entitled to the benefit of the agreement recited in the conveyance to pay off the mortgage and hence liable for a deficiency judgment: that the principle upon which such a case would be decided was that in equity the creditor is entitled to the benefit of all collateral obligations for the payment of the debt, which a person standing in the situation of a surety for others has received for his indemnity and to relieve him or his property from any liability for such payment.

Then came the case of Burr v. Beets, (24 N.Y. 128), which was an action to recover the amount of two mortgages executed with bonds by the defendant's grantor which the defendant assumed and agreed to pay. The defendant claimed that there was no privity of contract between the plaintiff and the defendant and that the plaintiff could not recover. The court applied the rule laid down in Lawrence v. Fox, supra, and granted the plaintiff the relief prayed for, holding that if one person make a promise for the benefit of a third person, the latter might maintain an action upon it. This case was followed by others wherein the grantor of the one sought to be held liable was personally bound to pay the mortgage and the grantee was held personally liable under the principle laid down in Lawrence v. Fox, supra. (Thorp v. Keokuk Coal Co., 48 N.Y. 253; Hand v. Kennedy, 85 N.Y.114).

In 1877 the case of Vrooman v. Turner, (69 N.Y. 280), reached the Court of Appeals. It was an action to foreclose a mortgage executed by the defendant Evans who conveyed to one Mitchell and through various mesne conveyances title came to one Sanborn. In none of these conveyances did the grantee assume the mortgage. Sanborn conveyed to the defendant Turner who assumed and agreed to pay the mortgage and the lower courts held Turner liable for a deficiency judgment. The Court of Appeals held that this was error, saying:

> "The rule which exempts the grantee of mortgaged premises subject to a mortgage, the payment of which is assumed in consideration of the conveyance as between him and his grantor, from liability to the holder of the mortgage when the grantor is not bound in law or in equity for the payment of the mortgage is founded in reason and principle, and is not inconsistent with that class of cases in which it has been held that a promise for the benefit of a thirty party may avail to give an action directly to the latter against the promisor, of which Lawrence v. Fox, (20 N.Y. 268), is a prominent example. To give a third party who may derive a benefit from performance of a promise, an action, there must be, first, an intent by the promisee, to secure some benefit to the third party, and second, some privity between the two, the promisee and the party benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise or an equivalent from him personally.

> "It is true there need be no privity between the promisor and the party claiming the benefit of the undertaking, neither is it necessary that the latter be privy to the consideration of the promise, but it does not follow that a mere volunteer can avail himself of it. A legal obligation or duty of the promisee to him, will so connect him with the transaction as to be a substitute for any privit with the promisor, or the consideration of the promise, the obligation of the promise furnishing an evidence of the intent of the latter to benefithhim, and creating a privity by substitution with the promisor. A mere stranger cannot intervene, and claim by action the benefit of a contract between other parties. There must be either a new consideration or some prior right or claim against one of the contracting parties by which he has a legal interest in performance of the agreement".

From a reading of the quotation which I have made from this case the question immediately presents itself as to the reason for the rule as it now stands in New York State. Is the rule bases on the doctrine of equitable subrogation or on the rule as laid down in Lawrence v. Fox, supra? Pomeroy in his work on Equitable Jurisprudence, 3rd Ed. Sec. 1207, and the judges of the courts of Washington have interpreted the case of Vrooman v. Turner, supra, as basing the rule on the doctrine of equitable subrogation. I do not believe that this is the true reason for the rule. However, solid such a reason might have been before the decision of Lawrence v. Fox, supra, it is no longer valid. Before equitable remedies can be invoked it is necessary to show an absence of an equivalent remedy at law (Thomas v. Music l Union, 121 N.Y. 45). This could be shown before the decision of Lawrence v. Fox, supra, but since that case there is no longer a lack of such remedy.

> "When the law has absorbed, in a broader equity, the narrower one enforced in chancery, the form and measure of the latter ceases to be of consequence" (Gifford v. Corrigan, 117 N.Y. 257).

It is nevertheless immaterial so far as the conclusion is concerned since, by adopting either line of reasoning we arrive at the same conclusion; that the subsequent grantee is not liable on his assumption agreement if his grantor was not personally liable.

As a result of our view of the authorities we consider that what has happened and the reason for the conflict in the different jurisdictions is this: That at common law a mortgagee had no right to proceed directly against the grantee of the mortgaged property who had assumed and agreed to pay the debt; that the

courts of equity desirous of aiding the mortgagees to an expeditious enforcement of their rights, and not being willing to do away with the rule requiring privity of contract between the parties extended the doctrine of equitable subrogation to aid the mortgagee; that when the doctrine of allowing a third party beneficiary to directly enforce a promise made for his benefit the question arose as to how far that doctrine should be extended. The courts, and in some cases, the legislatures, in the states in which the rule is that even if the chain be broken the mortgagee can recover, placed no limitation on the rule. In New York and the other states wherein the rule is adopted that the chain must not be broken, the courts refused to extend the doctrine that a party can recover directly from the promisee on a promise made to another for the third party's benefit, to the extent that a stranger might recover the benefitofof such a promise, and limited such actions to cases wherein there was some duty or obligation owing from the promisee to the beneficiary.

HARRY J. BARTLE.

CHILDREN'S COURT ACT - DISCRETIONARY POWERS - THE CONFLICT OF COURT AND PARENT.

1.

There is a principle in all government, workable and understandable, fundamental as the law of nature and paramount as life itself, and that is the law of self preservation. Nation, state or tribe, it is all the same, and its exemplification is in its youth, its regeneration.

In the lives and health of its children, themselves utterly and peculiarly helpless, in their protection as much as obedience to its laws, is involved the peace and safety of the state (People v. Pierson, 176 N.Y. 201-211).

"The unit of the state is the individual, its foundation is the family. To protect the unit in his constitutionally guaranteed right to form and preserve the family is one of the basic principles for which organized government is established. That natural parenthood implies both substantial responsibilities and gives substantial rights needs no discussion. That willful neglect to perform the one may properly result in the forfeiture of the other is also not open to debate." (Lacher v. Venus, 177 Misc. 558 188 N. W. 613).

Moreover, in respect of the children, the position and power of the state is paramount. In the rupture with the crown the prerogatives thereof devolved, not upon the non-extant Federal Government, but upon the people of the states, and each state was its own sovereign. It was and has remained the parens patriae. Except of the delegated portion in the Federal Government the power still remains in the people of the respective states. (Wheeler v. Smith, 50 U.S. ((9 How.) 55).

"It is the state and not the Federal Government, except in the territories and the District of Columbia, which stands, with reference to the persons and property of infants, in the situation of parens patriae." (Insurance Co. v. Bangs, 103 U.S. 435).

Whether it lies within the Federal power to legislate in respect particularly of children and their welfare, as, for instance, their education and labor, it is perhaps unnecessary to consider, and the question is much mooted. Especially is this so in the light of the present nationalistic trends. There can be no doubt, however, that until now, at least, the subject of children has been considered a local matter, neither delegated nor dedicated to the far reaching power of Congress, one reserved to the states for final supervision. (Hammar v. Dagenhart, 247 U.S. 251; Bailey v. Drexel Furniture Co., 259 U.S. 20).

The responsibility is not taken lightly. By amendment in 1921 the people have provided in their constitution, (N.Y.State Const., Art. VI, Sec. 18) that "the Legislature may establish Children's Courts ... and may confer upon them such jurisdiction

as may be necessary for the correction, protection, guardianship and disposition of delinquent, neglect d or dependent minors, and for the punishment and correction of adults responsible for or contributing to such delinquency, neglect or dependence...." The following year the Legislature enacted the Children's Court Act (Laws of 1922, Ch. 547). It is this act with which we are more immediately concerned. This is so because only recently some of its most salutary provisions have been tested and have not been found inadequate. The case was: Matter of Vasko, 238 A.D., 128; the subject was the diseased eye of an infant under sixteen the which, at least from the mother's point of view, it was for "God to do as He wanted"; the question was whether the Children's Court after a scrupulous investigation into the malady, had the jurisdiction and the power, the parents dissenting, to order the eye removed. It has been held that it could so order. By a juxta position and deletion of sections the pertinent provisions of the act may be stated to provide that a neglected child is one "whose parent, guardian or custodian neglects or refuses, when able to do so, to provide necessary medical, surgical, institutional or hospital care for such child" (Sec. 2, sub. 4 e); that such a child is subject to the jurisdiction of the Children's Court (Sec.6, sub. 1 g); that the court in its discretion may cause any person within its jurisdiction to be examined by a physician and that whenever a child appears to the court to be in need of medical or surgical care, a suitable order may be made for the treatment of such child in its home or hospital, or other suitable institution. (Sec. 24). It requires no added perspicacity to see that in the matter of children the Children's Court now has a complete and plenary and, perhaps, wholesome power. It is, for instance, a far cry from the days of People v. Pierson, supra, and Cowley v. People, (83 N.Y., 464). Those, were, respectively, a case in which a child was allowed to die of pneumonia because the prayer upon which alone the father relied did not prove sufficiently efficacious to effect a cure; and a case in which the secretary of the benevolent corporation "The Shepherd's Fold" willfully neglected a shepherd's duty to furnish sufficient food to a child of his flock. Accordingly, both were punished under the Penal Law, the applicable provisions of which now are Sections 480-494.

In this regard, until 1922, the Penal Law constituted the extent of the government and intervention of the state of natural family matters, unless, of course, progress, which is always viewed in retrospect, may be said to have remedied what now seems a neglect. Except, however, in retrospect it was not thereby necessarily neglectful.

By the law of nature as well as by the common law the parent, and in particular, the father, was the natural guardian of his child. (People v. Pierson, supra; People ex rel. Rhoades v. Humphreys, 24 Barb., 521; People ex rel. Olmstead v. Olmstead, 27 Barb. 9; Abrenfeldt v. Abrenfeldt, 1 Hoff Chan. 497; People ex rel. Roberts v. Kidder, 137 Misc. 347).

Formerly the father's right enabled him to keep the child under the control of him and his mistress of open adultery. (Ex parte Skinner 9 J.B.Moore, 278); and it prevailed, though his

only excuse for taking his eight months old child from its mother was the persuasive force with which it armed him in coercing his wife to give him control of her property. (The King v. De Manneville, 5 East. 221). This right, however, to its custody is not now absolute in any parent.

In the affirmative test of such right of custody, which, "except when adjudged as an incident to a suit for divorce or separation, is to be regulated as it has always been in one or other of two ways: by writ of habeas corpus or b petition to the Chancellor * * * or to the court that has succeeded to the Chancellor's prerogative." (Finaly v. Finlay, 240 N.Y. 239; Queen v. Gyngall, 1893, 2 Q.B.D., 232, 238; Matter of Spence, 2 Phillips, 247; Wilcox v. Wilcox, 14 N.Y. 575) the court, in the position of a "wise and affectionate parent" (Queen v. Gyngall, supra; Finlay v. Finlay supra), goes no farther than to determine what is for the best interests of the child. It is his welfare which is paramount in consideration, fundamental in determination, controlling in decision. To this effect the decisions are legion. Matter of Myer, 156 A. D. 174; Matter of Knowack, 158 N.Y. 482; Matter of Walch, 74 N.Y. 299; Cooley's Const. Lim., 8th Ed.727). And so are the elements determinative of the right: e.g., cruelty, (In re Gustow, 220 N.Y., 373), drunkenness (In re Reborg, 41 Hun, 645) tenderness of years (In re Pray 60 How. Prac., 194),aability of custodian to make provision (People ex rel. Beaudoin v. Beaudoin Complementing these are the provisions of the Penal Law (supra). They embrace abandonment, omission to provide, endangering life or health of child, permitting them under 16 to go alone to motion pictures or saloons, selling them tobacco and so on. Latest is one which makes tatooing a child under sixteen a misdemeanor.

There is, however, little reason to think this supervision boundless, and good considerations can be found why it should not be.

"Without doubt, it (the liberty guaranteed in the Fourteenth Amend.) denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free man." (Myer v. Nebraska 262 U.S., 390, 399).

"The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations" (Pierce v. Society of Sisters, 268 U.S. 510, 534, 535, following Myer v. Nebraska, supra).

"While the right of the natural parents to the custody of their children is not a proprietary right in the same sense as if the child were a chattel, and while it is accompanied by the corresponding duty which arises from the relation of parent and child, it has ever been regarded, even in primitive civilization, as one of the highest of natural rights. The state cannot interfere with this right simply to better the moral and temporal welfare of the child as against an uncffending parent. If so, then the state might transfer the handsome child of poor parents to the custody of a childless couple of wealth and moral refinement against the will of the natural parent. Of course the state has not so attempted, but if its rights over children are superior to those of the natural parents, then there is no legal difficulty in the way of such legislation provided a dominant public opinion may tolerate it. To hold that the state may permit its courts to determine without notice to the parent that he has forfeited his natural rights to the custody of his child, is nothing less than to assert that the powers of the state over the child are in their nature legally superior to the natural rights of the parent." (Matter of Livingston, 151 A.D. 1).

That an adult possessed of a sound mind has an absolute right to determine what shall be done with his body is established (Schloendorf v. Society, etc., 211 N.Y. 125) and an operation upon him without his consent, there being no emergency, is trespass and assault (same case; Pratt v. Davis, 224 Ill. 300; Mohr v. Williams, 95 Minn. 261). Formerly the same was practically so in respect of children and the care tendered them, though the high moral obligation resting upon the parent and the equally strong natural instincts of love and affection were undoubtedly considered to be possessed of a sufficient, if extra judicial, efficacy (Pierson v. People, supra). There was also a sort of subsequent supervisory control when a glaring neglect was projected from the family circle into the range of judicial scrutiny. (Cowley v. People supra). Undeniably, however, the present is far from the past. More interesting, even, is how far the present is from the future, how deep the power of the state and its courts to delve into family welfare, how extensive the right of the parent to brook no judicial interference in his exercise of parental prerogatives.

If the obligation of care resting on those having the custody is still recognized by penalties for non-fulfillment the law no longer stops there. Care, even, perhaps ever, discretionary, may now be exercised by the court, albeit probably at the expense of the erstwhile custodian. (Sec. 24). In short, its discretion would seem paramount to that of the father. Him demurring, an eye may nevertheless be ordered out. Conversely, presumably, another eye may be ordered left in, though he pleads to have it out; though, it may be, he is a specialist on eyes. If this seems to stretch the principle it should be remembered that many specialists differ; it might almost be said that it takes specialists to differ intelligently. Of course, in the case under consideration "the parents arbitrarily refused to permit the operation" and there was adequately painted by a specialist "indeed a tragic prospect for this child if left unaided by the surgeon's skill." But in all this, the difficulty remains subsistent. The

court stated that "medicine and surgery are not exact sciences, and the result of an operation may not be foretold with accuracy. Decision must be made, and the parents persist in their refusal to consent." Cursorily, it might be thought from this that here the decision to be made and consent of the parents were required to be synonymous or they would be made such. At least the refusal was overruled and it is not unfair to suppose that should parental refusal in any case be given weight it could nevertheless be held arbitrary if the greater weight were with the opposition.

It remains a question of power, a question whether in a given case the search for decision from the parents is one of binding obligation on the court or merely a perfunctory obeisance to an outmoded tradition. Extremes may resolve the doubt easily but they always set the precedent. Thus it usually is that the one extreme calls forth the sovereign control while the other extreme determines the limitations within which that control may remain constitutional. It is the focal point between them which remains the one difficult of discernment. No one would deny that a child having the lower part of a limb dangling by the skin is entitled to a complete computation and competent preservation of the remainder and of his life. Other things being equal, the father probably has the final right to determine whether his child shall have beef or chicken for dinner. In both of such instances certifude is a matteroof course. In the case in question result is uncertain of prophecy though the course was well advised.

Seemingly, if the power of choice is ever in the parent it should exist wherein the resolution of the doubt is debatable. If this is not to say that herein there could be any debate, neither is it to say that one such case can not readily arise. In such event certitude rather than discretion in determination would seem more compatible with constitutional safeguards and limitations.

Eugene V. Coffey.

CONTRACTS - DISAFFIRMANCE BY INFANTS *

LIENS LEGAL AND EQUITABLE.

One of the most troublesome problems which have arisen in the law is concerned with contractual obligations which have as one party to them an infant. An interesting example of this is found in the case of Egnaczyk v. Rowland, (148 Misc. 889). The plaintiff, concededly a minor, took his automobile to the defendant's garage for certain repairs, which were completed by the defendant. The plaintiff, being an infant, elected to disaffirm his contract but the defendant refused to deliver up the car without first receiving payment for the repairs, claiming the right to retain possession vested in him by virtue of Section 184 of the Lien Law. The plaintiff then brought this action in replevin to recover possession of the car. Judgment was originally entered for the plaintiff, but upon appeal, this decision was reversed. The opinion of the appellate court was based upon the equitable principle that the plaintiff could not recover possession of the car without first making restitution to the defendant for the improvements put upon it, the court quoting from the time honored principle expounded in (2 Kent's Commentaries, P. 240), "The privilege of infancy is to be used as a shield and not a sword. He cannot have the benefit of the contract on one side without returning the equivalent on the other."

In analyzing the various problems which appear in this case certain well-recognized principles must first be considered. The defendant claimed a right to possession under Section 184 of the Lien Law. This section is popularly known as the "garageman's lien." The statute gives the garageman a lien upon motor vehicles in his possession where he has a claim for storage supplies or repairs furnished or made at the request of or with the consent of the owner. It is that portion of this statute with which we are here concerned.

The lien established by Section 184 is a statutory creation. No such right was had at common law before the enactment of this statute. (Lloyd v. Kilpatrick, 71 Misc. 19). It is, therefore, in derogation of common law and must be strictly construed. (Johanns v. Fiske, 224 N.Y. 513).

The lien is only assertable where the claim upon which is based the lien sought to be asserted arises as a result of supplies furnished or repairs made at the request or with the consent of the owner or the person in rightful possession (Schummers v. Martin 199 A.D. 908 reversing 115 Misc. 572; Lloyd v. Kilpatrick, supra) but not by lessee or sub-lessee, such not being ejusdem generis with an owner, conditional vendee or mortgagor in possession. Wakefield v. Fargo, 90 N.Y. 218; Hickey v. Taaffe, 99 N.Y. 204). Mere knowledge is not consent. (Rice v. Culver, 172 N.Y. 60; Cowen v. Paddock, 137 N.Y. 188; Sprink v. McRoberts, 139 N.Y.193).

It seems therefore, that the lien created by Section 184 of the Lien Law depends upon a contractual relation between the parties, there being necessary an express or implied meeting of the minds of both parties. The right of the defendant Rowland to assert this lien depends upon the contractual relationship between himself and the plaintiff.

Since the lien cannot be enforced without enforcing the contract the right to the lien depends entirely upon the contract and inasmuch as the plaintiff infant has disaffirmed his contract, avoiding hisoobligations thereunder, the lien being only an incident to a legal liability to pay a debt, falls with the contract. (Wyatt v. Lortscher, 217 A.D. 224; Denniston v. Brown, 183 Iowa 396; McCarty v. Carter, 49 Ill. 53; Alvey v. Reed, 115 Ind. 148; Richardson v. Little, 209 Ala. 351; Bloomer v. Nolan, 36 Neb.51). It is apparent in view of these authorities that the defendant Rowland cannot assert a lien against the plaintiff's automobile under Sec. 184 of the Lien Law.

Although, therefore, the defendant is to be refused a lien upon the automobile in the case before us, there is still another matter to be discussed. That problem is,- can the defendant set up any equitable defenses which must be satisfied before the plaintiff can recover the possession of his automobile. It was upon this principle that the court reversed judgment in favor of the defendant in Egnaczyk v. Rowland, supra. This principle is one of the oft-quotes maxims of equity - that he who seeks equity must do equity. An infant in rescinding his contract is in equity. The courts of New York have adopted the principle that where an infant seeks to rescind his contract and recover back that which he has parted with in reliance thereon, he must restore what he has received. In the words of Chancellor Kent, "the infant cannot have the benefit of a contract on one side without returning the equivalent on the other." (2 Kent's Commentaries p. 240). And so it has been held that where an infant purchases goods and gives a mortgage upon them to secure the purchase price he can affirm both the purchase and the mortgage or disaffirm both, but he cannot disaffirm the mortgage and keep the goods (Ottman v. Moak, 3 Sandf. Ch. 431): that where an infant purchases property and receives a deed and in return gives back a purchase money mortgage he cannot avoid the mortgage and affirm the deed (Lynde v. Budd, 2 Paige 191); that where an infant purchases a car and makes several payments on the purchase price he cannot recover that amount without allowing the vendor the value of the depreciation of theproperty (Myers v. Hurley Motor Co., 273 U. S. 18; Sparandera v. Staten Island Garage Inc., 117 Misc. 780).

These and other cases along the same lines proceed upon the theory that the infant cannot rescind and be unjustly enriched where he should and can make restitution to the other party. A court of equity will look at the real transaction and will do justice to the adult if it can be done without disregarding or impairing the principle that allows an infant to disaffirm. (Rice v. Butler, 160 N.Y. 578; Myers v. Hurley Motor Co., 273 U.S. 18); Lown v. Spoon, 158 A.D. 900; Joseph v. Schatzkin, 259 N.Y.241

This, however, is not an absolute rule. It is subject to a very important qualification which restricts its application. The rule is applied only when it is shown that the infant still retains the consideration which he has received from the adult, and it is in his power to return it. (Dickerson v. Gordon, 52 Hun 614). The right of the infant to avoid or rescind contracts

made during minority does not depend upon his ability to restore the consideration received or otherwise make restitution to the other party but to the extent that he still has the consideration the other party becomes entitled thereto. (Casey v. Kastel, 237 N.Y. 305). While it is inequitable to allow the infant to avoid the obligation on his part and at the same time retain benefits which continue to enrich him, he is not required, at all hazards, to restore the other party to the contract to his former position. (Wyatt v. Lortscher, supra).

And so, in accord with these statements it has been held (Allen v. Lardner, 78 Hun 603) where an infant purchases lumber and other materials to erect a house upon his land and gives to the vendor a mortgage as collateral security, upon his rescission of the contract and the mortgage he cannot be compelled to return to the vendor that which he has received, which has now been converted into part of the realty. He is in no position to return it. The right of the infant to rescind is a legal right established for the protection of the infant and to make it dependent upon performing an impossibility, which impossibility has resulted from acts which the law presumes him incapable of performing would tend to impair the right and withdraw the protection. (Green v. Green, 69 N.Y. 553; Kane v. Kane, 13 A. D. 544).

It must be kept in mind that these cases, and the Egnaczyk case did not involve a contract for necessaries. It was conceded in that case that that problem didrnot enter into the controversy. Necessaries are those supplies furnished a person either for protection of his physical well-being or for a proper cultivation of his mind (Hassard v. Rowe, 11 Barb. 22; Tapper v. Cadwell, 12 Metc. 559; Putnam v. Ritchie, 6 Paige 390) and in proper instances a contract made by an infant for such supplies cannot be avoided.

To return to the Egnaczyk case it must be determined whether the facts therein come within the principle adopted by the courts of equity or if the case is barred by the restrictions placed upon the applicability of that principle. The difficulty here is that there is no proof as to just what was done to or with the plaintiff's car, except that there was a stipulation made that a certain part of the total price was for labor and another part for material. This is unfortunate for to my mind it is rather important just what were the repairs made. In th s respect I disagree with the conclusions reached by Judge Hazard. He states that it would be very unjust to allow the plaintiff to take the car with a new and good carburator on it in place of a worthless or defective one, and that if he were to be allowed to do this he could have any radical repair work done without paying for it. In my opinion there is a great distinction between the installation of a new part and repair of an old one, such as the grinding of the valves. I too, would consider it unjust to allow the infant to take away a new horn, or a new carburator, which might easily be removed and returned to the defendant. In such a case the equitable principle is easily applicable. The problem arises in the case of a simple repair of some part of the mechanism which blends into the vehicle itself. To compel the infant to make restituti n would be in effect an enforcement of his contract. The theory of equitable

restitution cannot be extended to such extremes. To do so would be effectually to erase all the protection thrown about the infant. In such a case the infant should not be bound to pay for that which he has received before he can rescind his contract and recover back that with which he has parted.

Judge Hazard further states that "the court below has permitted the infant plaintiff here to use his infancy as a sword and not restricted it to use as a shield. In other words he seems to have approved of the plaintiff perpetrating what seems to be like a bald swindle by permitting him to deliberately order certain repairs to his car and then deliberately refuse to pay for them. There is nothing defensive about such a situation as that; on the contrary it is decidedly aggressive." Such was the holding in Falk v. MacMasters, (197 A. D. 359) wherein the Appellate Division, Second Department said, "while as a defendant the courts will protect him (the infant) from further liability on his contracts they will not aid him in getting back money or property which will give him profit or gain through his fraudulent representations regarding his age." But the Court of Appeals has not gone that far, and it makes no difference whether the infant is the plaintiff or defendant. (Sternlieb v. Normandie Nat. Securities Corp. 263 N.Y. 245). There is nothing aggressive where the infant makes no representation as to his age so as to mislead the adult since persons who deal with infants do so at their peril. (Alvey v.Reed supra). Even in cases where there has been a misrepresentation as to age the courts of New York have consistently held that the infant is not estopped. As the court said in International Text Book Co. v. Connelly, (206 N.Y. 188) to hold otherwise would in many cases deprive infants of the protection extended to them at an age when the mind and judgment are conclusively presumed to be immature and they need to be shielded from their own imprudence and folly.

The results reached herein might seem to be harsh and hard upon the person dealing with the infant. The court in the Egnaczyk case says, "that decision(of the court below in favor of the infant plaintiff) definitely and emphatically shocks one's sense of justice and fairness and decency." It is quite possible to find isolated instances which appear to be without justice. In this respect the law respecting infancy always has been considered a cold legal principle. Yet, we must not lose sight of the reason for the rule. The safeguards thrown about minors were made rigid for the protection of persons whom the law considers not to be entirely capable of dealing with their property and entering into contracts. Today it seems somewhat a curious anomaly that a young man lacking but a few months or a year of attaining his legal majority shall be considered incapable of entering into a binding contract not subject to his avoidance. Because of the present advance of civilization, particularly in the field of education, many persons legally minors are as well, and in many instances better, equipped to protect and further their own interests. But the rule is what it is and must be upheld as a general principle working for the public good.

HAROLD R. ALTUS.

NEGLIGENCE - NUISANCE - GOLF-PLAYERS - COUNTRY CLUBS.

The recent case of Gleason v. Hillcrest Gold Club, (148 Misc. 246), presents a rather interesting and unique situation. In this case, defendants, an individual, one Knorr, and a golf club which owned and maintained a golf course, were held liable jointly and severally for injuries received by an occupant of an automobile proceeding along an adjoining public highway, when the windshield of the automobile was shattered by a golf ball driven by the individual defendant in a direction almost parallel to the highway. There was a wire fence about six feet high along the edge of the golf course and about twenty-five feet from the highway.

The individual defendant was held liable for negligence in failing to use the proper degree of care and the defendant golf club on the theory of nuisance and/or negligence for maintaining its property in such a manner so close to the public highway and failing to use reasonable care to protect persons traveling thereon.

Knorr submitted that he did everything that a reasonably prudent man would have done under the circumstances; that he exercised due care in playing the ball; that he looked around, shouted "fore" and then struck the ball, intending it to travel in the proper direction; and that the fact that the ball veered to the right and struck the car could not have been reasonably anticipated.

The defendant club maintained no negligence could be imputed to it for the reason there was no breach of duty on its part; that there was no proof that balls had been previously hit over the fence; that it could not be required to anticipate danger from the source in question; and, therefore, it could not be guilty of negligence in failing to guard against such happening.

At first blush the liability imposed on these defendants may seem harsh and unfounded under the circumstances but on closer examination it will be seen that such conclusion is the only logical one that could be arrived at.

It is not disputed but that Knorr intended to drive the ball correctly, but in hitting the ball he "sliced" it. It is a matter of common knowledge that such can happen to the most experienced player.

A golf ball is in itself an innocent, lawful article, and so is the club which drives it. The game itself being fundamentally honorable and sportsmanlike, suggests nothing imminently unlawful or hazardous about it. But, when driven, though in full compliance with the rules of the game, the ball attains great speed and thus may become a dangerous and destructive object and may strike with great violence and force.

Though golf may not be deemed a hazardous game, yet a driven golf ball is a very dangerous missile and its flight and direction cannot always be controlled by the player. That uncertainty is part of th game. The element of danger, therefore, though not intrinsic in the game itself, is nevertheless present. The situation is not changed by the fact that the act of propelling the ball is in itself not wrongful and is for a lawful purpose. (Simpson v. Fiero, 237 A.D. 62).

The presence of the risk imports liability. As was said by Chief Judge Cardozo in Palsgrof v. Long Island R.R.Co. (248 N.Y. 339), "The risk reasonably to be perceived defines the duty to be obeyed; and risk imports relation; it is risk to another or others within the range of apprehension". Thus, if there be a possibility of danger and if the doing of a lawful act may naturally and probably result in harm, though unintended, in relation to plaintiff, there is an actionable wrong.

The plaintiff had a right of bodily security and was entitled to be protected against being struck by the ball and that right being violated she should recover, though the interference with her right did not result from knowing and willful conduct of defendants, as long as the striking of the ball and the causing of the harm to her was within the range of natural probability.

There is no reported case in point in this state. Scattered cases are to be found in several other jurisdictions, involving the striking of a caddy or a person while standing on the green. The only case dealing with the striking of a person outside of a golf course is Castle v. St. Augustine Links. (38 Times L.Rep. 615) decided in 1922 by the Kings Bench Division, England.

Like baseball, golf is not a nuisance per se. Both games involve the same element of danger. If the ball playing is attended with a reasonable degree of danger, and a traveler in the street is injured, liability will attack onthe theory that the playing was a nuisance.

Young v. N.Y., N.H. & H.R.R.Co., 136 A.D. 730;
Harrington v. Barden City Mfg. Co., 240 Mass. 170;
Lane v. City of Buffalo, 23[illegible] A.D. 334)

The plaintiff had a right to be traveling in the auto upon the highway. The roadway was safe, the car carefully driven and the conditi ns were such that no one on the highway could be reasonably required to anticipate that a ball might fly against the car any minute.

The primary purpose of the highway is use by the public, for travel and transportation and anyone who interferes with such use is guilty of a nuisance. Tinker v. N.Y., O. & W.Ry.Co., 157 N.Y. 312).

The rights of the public to a free and unmolested use of the highways are paramount. (Welsh v. Wilson, 101 N.Y. 254; Callanan v. Gilman, 107 N.Y., 360). The fact that the act complained of was done on private soil does not affect the liability though the act was inherently lawful and for a lawful purpose. At the same time it may be wrongful as to another? Klepper v. Seymour Corp., 246 N.Y., 84).

As a general rule every person may exercise exclusive dominion over his own property and subject it to such uses as will best subserve his private interests. But this general right of property has its exceptions and qualifications. Campbell v. Seaman, 63 N.Y. 586). Every person is bound to make a reasonable use of his property so as to occasion no unnecessary damage or annoyance to his neighbor. If the use is reasonable and injury results he is not liable; if the use is unreasonable he is liable for the consequential damage. A use of property in one locality and under some circumstances may be lawful and reasonable which under other circumstances, would be unlawful, unreasonable and a nuisance. De Agramonte v. City of Mt. Vernon, 123, A.D. 717). A person will not be permitted to accomplish a legal object in an unlawful manner, Hay v. Cohoes Co., 2 N.Y. 159, and this is so regardless of the degree of care used. The public travel must not be endangered to accommodate the private rights of individuals.

As to whether the club is liable, it may be said that accidents like the one in question are very rare. As before stated, there are a few golf club cases, but all deal with an accident to a caddy or a person on the golf premises at the time. (Toohey v. Webster, 117 Atl. 838; Beiskopp v. Hoffman, 287 S. W., 542).

The case of Castle v. St. Augustine's Links (supra) is directly in point and it was there held that the driver of a taxi could recover from the player on the theory that he was negligent in striking the ball while there was someone on the adjoining highway who might be injured by a mis-directed ball, and that he could also recover from the golf club on the theory that the particular portion of the grounds was a nuisance under the conditions and in the place where it was situated. The club was under a duty to obviate the danger to persons on the highway and this could be done in several ways, as by omitting the objectionable hole, or playing it in a different way.

In the case in question liability can be predicated either on the theory of negligence or nuisance as the basis of liability is the same. Junkerman v. Tilyan Realty Co., 213 N.Y. 404. Liability does not arise unless the dangerous condition is known, or with the exercise of due care should have been known. It is the nature of the use itself which creates the duty. Herman v. City of Buffalo, 214 N.Y. 316). When the above elements exist, liability may be founded on either tort. It is sufficient if it be shown that the club intended the condition -- the creation

and maintenance of the particular grounds, -- although it may have thought it was not dangerous or been thoughtless in that regard. (Stern v. International Ry.Co., 230 N.Y. 285). If the action is based on the theory of nuisance it may be sustained on proof of an absolute duty, and if on the theory of negligence, it will be supported by a failure to use the degree of care required in the particular circumstance, which is a violation of a relative duty.

"Any lawful act or omission of duty which interferes with, obstructs, or tends to obstruct, or renders the highway dangerous for passage constitutes a public nuisance". (McNulty v. Ludwig & Co., 153 A.D., 206. Nelker v. City of New York, 190 N.Y.481).

Generally, every use by one of his property which violates the rights of others is a nuisance. A nuisance does not rest on the degree of care used, but on the degree of danger existing even with the best of care.

Uggla v. Brokaw, 117 A.D., 586;
Vicent v. Cook, 4 Hun 318;
Hayes v. Mich. Cent. R. R. Co., 111 U. S. 228).

Applying the principles enumerated by the above authorities, no reasonable distinction can be drawn between the case of a traveler on a public highway being struck by a falling building, or falling into an excavation adjoining the roadway on private property, or being injured by an object set in motion from private adjacent premises. If the owner of land in the former cases is liable to a traveler on the ground that he has not provided a means whereby harm might be reasonably averted to one having no cause to expect danger, then by analogous reasoning, the converse situation must also determine liability -- that the owner of such premises who creates a condition on his land, or who maintains such a condition in a manner imputing presumptive knowledge thereof, whereby an object from the land injures a traveler on the highway, is in duty bound to take appropriate means to ward off the danger. (Gleason v. Hillcrest Golf Course 148 Misc. 246). It would not be enough to avert liability even if such accident had not happened before as was the situation in the case under discussion. Only if such an accident were unlikely in the highest degree in the minds of reasonable men would there be basis for exoneration. (Cleveland v. New Jersey Steamboat Co., 125 N.Y. , 299).

Thus in the case under discussion, the fact of the ball veering over the fence and striking the car on the turnpike, and the proximity of the course and the particular hole to the road are the two particular concurring causes of the accident as Judge Pette said in deciding the case, "The doctrine of Res Ipsa Loquitur may well be applied in this instance".

The player's liability rests in negligence for failure to use the degree required in the particular instance, he being accountable for the natural and probable consequences of his act in driving the ball; and the club is also rightfully answerable for creating and permitting the condition to exist, as well as for failure to use reasonable care to prevent injury to a person lawfully on the highway as the plaintiff in this case certainly was. Without the concurrence and cooperation of both causes the accident could not have happened. Thus the court was right in holding both jointly and severally liable though the liability of each is grounded on an independent theory. Furthermore, as was held, the plaintiff should not be required to elect whether to proceed on the theory of nuisance or negligence, a recovery on one or both theories being permissible.

(Sweet v. Perkins, 196 N.Y., 483;
Ackerman v. True, 175 N.Y., 353.)

EUGENE H. BE HAGE.

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CONSTITUTIONAL LAW

POWER OF CONGRESS OVER MONEY - THE GOLD HOARDING ACT

Among the recent Congressional enactments, the one that touches many people most deeply is the Gold Hoarding Act and the resultant executive orders. Gold, always of great importance, has again come before the public eye, or perhaps more literally is to disappear from the public eye. Bryan might well rejoice at the passage of these acts for it would seem that mankind is not to be crucified "upon a cross of gold".

On March 9, 1933, the President approved an "act to provide relief in the existing national emergency in banking and for other purposes". The Act first contains a declaration of Congree that an emergency exists, and then in Title 1, Section 2, gives the President the power in time of war or emergency, through any agency he may designate to investigate, regulate, or prohibit the export, hoarding, melting or earmarking of gold or silver coin, bullion or currency; and any person may be required under oath to furnish complete information thereto, and whoever violates these provisions shall be fined $10,000, imprisoned not more than 10 years or both. Section 3 provides that the Secretary of the Treasury, when necessary to protect the currency may require anyone to deliver all gold coin, bullion, or certificates to him and be paid an equivalent amount of any other currency of the United States and makes anyone failing to comply with this section liable to a fine of twice the value of gold he has failed to turn over.

The President, in pursuance of this authority, declared an emergency existed and on April 5, 1933, issued an executive order requiring with certain minor exceptions all persons to deliver to a Federal Reserve Bank on or before May 1, 1933, all gold coin, bullion or certificates, owned by them and be paid an equivalent amount of other currency for them. The Secretary of the Treasury was authorized to make such further regulations as he deemed necessary to carry out the purpose of the order. Failure to comply with the order was made punishable as in Title 1, Section 2.

Then on August 28, 1933, a third executive order (the second is of no importance here) was issued. It declared that an emergency existed and required every person owning (or holding it seems) gold coin, bullion, or certificates, with the same exceptions to make under oath and file within 15 days a return containing amount of such, kind, owner, etc. The Secretary of the Treasury was empowered to give licenses to hold the gold for longer, but 30 days after the order, no person could hold an interest, legal or equitable, in any gold coin, bullion or certificates. Failure to comply with this also was made punishable. This order also revoked previous orders for the future. Pursuant to the order, the Secretary of the Treasury issued certain orders extending the time for filing a return to September 18, and deemed the filing of a return an application for license, and also prescribed the form of return and conditions as to licenses.

The first attack on this policy of the government was made by Frederick B. Campbell when he brought action against the Chase National Bank of New York for specific performance of its contract of bailment with him for 27 bars of gold bullion which it refused to deliver to him. A short time after filing his complaint, Campbell was indicted by the United States Grand Jury for failure to make a return of his gold holdings and on a second count for having owned certain gold bullion having a value of $200,000 or upwards without a license. Campbell demurred to the criminal action and brought several other civil actions to protect his rights, all of which are unimportant here. Judge Woolsey, sitting in the D.C.S.D.N.Y.heard all the motions brought under these actions at one time. After disposing of certain minor points, he considered in order the four points raised by the demurrer, and for the purpose of convenience we shall consider them in that order.

1. Did Congress have power to pass Title 1, of Act of March 9, 1933?
2. If Congress had the power did it exercise it in a proper manner?
3. Were the executive orders within the power given under the act?
4. Were the orders exercised in a constitutional manner?

(1) The first question involves the consideration of the control of Congress over currency. Among the powers delegated to Congress in Act 1, Sec. 8 (clause 2,5,18) are the powers "to borrow money on the credit of the United States", "to coin money, regulate the value thereof, and of foreign coin.....". "To make all laws which shall be necessary and proper for carrying into Execution the foregoing Power, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof

Though of immense importance it is remarkable how few cases have arisen under this power of Congress over currency. As Professor Willoughby says: "The authority there given has been freely exercised by Congress but this legislation has given rise to very few constitutional questions". (Constitution of U.S. 1929, Vol.II, P. 1100). However, becuase of the questions raised by the Campbell case, a survey of the scope and effect of these decisions is necessary.

Among the causes of discontent among the colonies prior to the Revolution was the prohibition which Parliament placed on the emission of bills of credit. So, at the outbreak of the War the Continental Congress, exercising its governmental functions, issued such bills and to the amazement of all, successfully conducted the War, using these "Continentals" as currency. All these facts were known to the framers of the Constitution, and yet purposely they left the control over money in the one brief clause.

For many years after the Constitution Congress changed the gold content of coin and the ratio of gold to silver and no murmur of protest was heard. One of the first cases to arise was U.S. v. Marigold (1850-9 How. 560) in which the Supreme Court upheld an Act of Congress providing for the punishment of persons who bought counter-

feit coins here or uttered them with intent to defraud. The interesting point about thiscase is that the Court based its decision, not on the counterfeiting clause of the Constitution (Art.1,Sec.1, Cl.6), but rather on the power of Congress to regulate the currency. The Court said at page 567 "The power to coin money being thus given to Congress founded on public necessity, it must carry with it the correlative power of protecting the creature and object of that power." The significant fact here is the emphasis placed on the idea of protection; and it would seem that measures,the purpose of which, is to protect the currency are valid. This would mean that if the gold acts can be considered a protection they would be constitutional under the clause.

During this early period the Court also declared that Congress could give priority to U.S. debts in case of bankruptcy (Fisher v. Blight, 2 Cranch 358). It upheld the incorporation of a National Bank with the rifht to issue bills which pass from hand to hand as money (U.S.Bank v. Bank of Ga., 10 Wheat.333,347; Ward v. Smith, 7 Wall. 444,451); The power to charter banks (McCullock v. Md., 4 Wheat. 316; Osborne v. U.S.Bank, 9 Wheat. 738); all under its power to borrow money and over the currency, as being "necessary and proper".

The Civil War started a new set of decisions based on the so called Legal Tender Act of Congress. The first of these in 1868, The Banks v. The Mayor (7 Wall.16) and Bank v. Supervisors (7 Wall.26 held that U.S. notes and certificates of indebtedness were exempt from taxation, as, though they partook of the nature of money, they were nevertheless obligations of the United States.

The next year Veazie Bank v. Fenno (8 Wall.533) upheld the constitutionality of a 10% tax on banknotes issued by State Banks. Though the bank in this case pointed out that the purpose of the act and its necessary result was to tax these notes out of existence, the Court declared that it could not question the motives of the legislative branch for it was acting within its defined powers in "protecting" its own currency.

Then came several most interesting cases when the Supreme Court directly reversed itself almost over night. After upholding the tax on the State bank notes, supra, in Hepburn v. Griswold (8 Wall.603, 1869), decided at the same term, the Court declared the legal tender acts invalid insofar as they applied to debts contracted before their passage. However, the decision is based principally on the reasoning that it violated the "obligation of contracts" clause and not necessary and proper for the carrying on of the war, within the commerce clause or that for borrowing money. The Court nowhere discussed its validity under the currency power, and there would seem to be no doubt but that the acts could not be upheld under the powers invoked.

The case, however, needs no extensive discussion here, for in the Legal Tender Cases (Knox v. Lee, Parker v. Davis, 12 Wall.457) it was overruled. It would not be out of place here to note briefly the very interesting history of the Court itself at that time in order to determine the validity of the decision. Hepburn v Griswold was decided on Nov. 27, 1869 (announced Feb. 7, 1870) by but eight

justices, though a law had been passed April 10, 1869, providing that the Court should consist of nine, but this was not to take effect until Dec. 1, 1869. On Feb. 1, 1870, Justice Grier of the majority in the Hepburn case resigned and Feb. 18, Justice Strong who was to write the overruling opinion was appointed and on March 21 Justice Bradley who wrote a very vigorous concurring opinion was raised to the bench, thus making up the nine. A short time after this the Court directed a re-hearing of the Hepburn case and the expressly overruled it, with the newly appointed justices furnishing the necessary majority. Another interesting point is that the very strongest proponent of the passage of the acts was now Chief Justice, the one who, in the Hepburn case, had written the opinion which declared invalid the acts for which he had striven while Secretary of the Treasury. Thus it may be seen in those turbulent days even the Supreme Court itself felt the effects of the Reconstruction.

This case being the most important authority for any decision involving the currency power must be closely analyzed. The Court, of course, first asserted the broad principles of constitutional review and then considered the acts under the currency power, and with no hesitation declared these acts were necessary and proper and constitutional as to debts contracted both before and after passage. It recognized that control of the purse was an essential attribut of a sovereign and that in view of our own history the framers must have intended that Congress should have that great power. The Court took judicial notice of the fact that an emergency existed and said "It is not to be denied that acts may be adapted to the exercise of lawful power and appropriate to it in seasons of exigency which would be inappropriate at other times". (P.545). That point is of great importance now, in view of the fact that all the "New Deal" legislative enactments start off with a declaration of emergency. In answering the arguments raised by the Hepburn case, which are of course raised by the Campbell case, the Court declared "Every contract for the payment of money (not some definite species simply) is necessarily subject to the constitutional power of the government over currency whatever that power may be; and the obligation of the parties is therefore assumed with reference to that power (Davis 28, Barrington v. Potter, Dyer 81 b.Zoll 67, Law v. Marsteller, 2 Cranch 29, P.549). Therefore Congress may exert a delegated power, though the effect of such exertion may be to impair and even annul contracts (P.550). The much quoted concurring opinion of Mr. Justice Bradley came out much more flatly and said, "It is absolutely essential to an independent national existence that governemtn should have a firm hold on the two great sovereign instrumentalities, of the sword and the purse, and the right to wield them without restriction on occasions of national peril". (P.563). And of even greater importance for our purpose: "But the creditor interest will lose some of its gold! Is gold the one thing needful? Is it worse for the creditor to lose a little by depreciation than everything by the bankruptcy of his debtors? Nay is it more worse than to lose everytning by the subversion of the government?" (P.564)

Since we must consider the arguments on both sides, it is well to note that the dissenting opinions, besides repeating their old arguments added at page 588, per Mr. Justice Clifford: "Intrinsic value exists in gold and silver, as well before as after it is fab-

ricated and stamped as a coin, which shows conclusively that the principal discretion vested in Congress under that clause of the Constitution consists in the power to determine the denomination, fineness or value and description of the coins to be struck, and the relative proportion of gold or silver whether standard or pure, and the proportion of alloy to be used in minting the coins."....
Had this been the decision of the majority there would be no question that the present gold hoarding act would be invalid, for the power is limited by those words to a few inconsequential rights.

After this case, the Court held Congress can deny the quality of legal tender to foreign coins (National Bank v U.S., 101 U.S. 1). Then in 1884, in Juilliard v Greenman, (110 U.S.421), it again asserted the doctrine laid down in the Legal Tender Case, supra, by upholding the constitutionality of the law of the U.S., prohibiting the further retirement of U.S. legal tender notes, thus keeping them in circulation in time of peace. The crisis of the Civil War had passed, but the panics of the 1870's necessitated the acts. The Court also reiterated the doctrine that Congress in exercising a given power may indirectly impair contracts. In respect of impairment of contracts there is, of course, no constitutional inhibition which operates on the Congressional power.

These cases bring us down to the present time and question - Can Congress prohibit the hoarding of gold? It can be seen that there is no case directly in point nor even close to this point. The nearest one is Ling Su Fan v. U.S. (218 U.S.302) where the court affirmed a conviction under Philippine Law No.1411, passed under the power given by Congress. This law made criminal the exporting from the Islands of silver coin, or bullion made from the coin. The reason for the act was that in Hong Kong bullion value was 9% greater than face value. Since, in reaching its conclusion, the Court cited no cases and based much of its reasoning on fact that coined silver had an added value, the case is really no precedent for this question. However, it seems that the question in fact is not an open one, but rather that the trend of the above decisions all point inevitably to the conclusion reached in the Campbell case, namely, that the act is constitutional. To justify this declaration, it is necessary to review the principles declared by these decisions as applied to the present case.

In the first place, the court can take judicial notice that an emergency existed at time of its passage - banks were closed and a general panic was prevalent in the country Campbell v Chase National Bank,(5 F.Supp.156). In Atchison etc Ry. Co. v. U.S.,(1931, 284 U.S. 248) the Court judicially recognized the present depression, saying (at P.260) "It is the outstanding contemporary fact, dominating thought and action throughout the country." It would seem that the words of Justice Holmes in Block v Hirsh, (256 U.S. 135) are directly in point: "In this instance Congress stated a publicly notorious and almost world-wide fact" (P.154). While it is true that an emergency cannot beget a power in Congress, nevertheless, we have seen that an emergency may afford a reason for the exertion of a power already enjoyed. (Legal Tender case, supra; Wilson v. New, 243 U.S. 332; Ex Parte Milligan, 4 Wall. 2). The reason for this appears to be that in times of emergency something may become nec-

essary and proper that would not be so at another time and therefore come within the final clause of Art. 1, Sec.8. It must also be remembered, in determining the question, that this is a constitutional problem, and "it is not on slight implication or vague conjecture that the legislature is to be pronounced to have transcended its powers and its acts to be considered void", (Fletcher v. Peck, 6 Cranch 87,128). "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited,but consistent with the letter and spirit of the Constitution are constitutional" (McCulloch v Md., 4 Wheat.316, 421). And again "In considering this question, then we must never forget that it is a constitution we are expounding" (same case, P. 407). These great principles of constitutional review, thus so concisely laid down by Chief Justice Marshall a century ago, must still be the basic underlying guides in any question raised under the Constitution in giving to it that broad construction which such a perfect instrument as ours demands.

Those principles applied to the present case necessitate that one fact be found to uphold the constitutionality of the act in question that is, that gold bullion has such a close relationship to money that in order to protect our currency it may become necessary to place certain restrictions on the holding of gold. No one can deny that "gold has for ages been the symbol of welath, and in modern times has been recognized throughout almost the whole world as the basis - sometimes alone and sometimes in connection with silver - of all currency and credit" (Campbell v Bank, supra, P.168). It seems there can be no question of the close relationship between gold and money and, because of this, gold cannot really be considered an ordinary commodity. Once this premise is admitted, then from the doctrines laid down in Veazie Bank v. Tenno, supra, and the Legal Tender Cases, supra, if these times of emergency demand that the holding of gold be restricted and controlled, in order to protect the currency of the nation, then such acts are constitutional. The history of these decisions shows that the Supreme Court has ever been ready to concede that under its broad power over currency, Congress has been given that power inherent in all sovereignties to control and protect its currency. This power is declared in thevery interesting case of Emperor of Austria v. Day (2 Giff 628,678; 66 E.Rpnt. 263,284) as: "But the regulation of the coin and currency of every state is a great perogative right of the sovereign power ..... Therefore, the perogative of each sovereign state as to money is but a great public right recognized and protected by the law of nations". Of course, our Federal Government is one of delegated powers (McCulloch v. Maryland, supra, but in delegating to the Congress power to regulate the currency and to borrow money on the credit of the U.S., the Supreme Court of the United States has said in effect that the States have given Congress that great sovereign power to protect its currency and to maintain the credit of the U.S.; stating it thus, that; "It cannot be imputed to wise and practical statesmen, nor is it consistent with common sense that they should have vested this high and exclusive authority and with a view to objects partaking of the authority itself, only to be rendered immediately vain and useless as must have been the case had the government been left disabled and impotent as to the only means of securing the object in contem-

plation" (U.S. v. Marigold, supra, p. 567). Therefore, because of the close relationship between gold and currency, it would seem that there is little doubt but that Congress had power to pass Title 1, Sec.2 of Act. of March 9, 1933, at least as far as it attempts to investigate, regulate, or prohibit the export, hoarding, melting or ear-marking of gold or silver coin or bullion or currency.

Under Sec. 3 of Title 1, of the Act of March 9, 1933, the Secretary of the Treasury is given the power to requisition all gold coin bullion and certificates, when he deems it necessary to protect the currency system. This provision must have been to effectuate the prohibition of gold hoarding, and, since it appears that prohibition is valid, the question is raised as to the constitutionality of the method of carrying it out. This necessitates a discussion of the power of eminent domain, which though not absolutely necessary to the decision in the Campbell case, Judge Woolsey went into in some detail.

In Fletcher v. Peck (6 Cranch 87,145) it was declared to the effect of the right of eminent domain against the individual "amount to nothing more than a power to oblige him to sell or carry when the public necessities require it."

The right of eminent domain always has been considered a necessary perogative of any sovereign power - as "inseparable from sovereignity unless denied to it by its fundamental law" (Kohl v. U.S., 91 U.S. 367,371). No one seriously contends that the Federal Govern ment has not this power, and, though the Federal Government is one of delegated powers, nevertheless this right requires no constitutional recognition. (Miss.R.River Boom Co. v. Patterson, 98 U.S. 403,406; Monongohela Nav.Co. v. U.S.,148 U.S.312,324). The fifth Amendment is an implied recognition of the existence of the power. (Kohl v. U.S.,supra, U.S. v. Jones,109 U.S. 513,518; W.River Bridge Co. v. Dix, 6 How. 507) and that Amendment is not a limitation on the power to take but only since there must be just compensation a condition of its exercise (Long Island Water Supply Co. v. Brooklyn, 166 U.S.685,689). There is the further condition that the use must be a public one Brown v. U.S. (263 U.S. 78); Kohl v. U.S.,supra, This means that Congress in executing the right of eminent domain must use it in connection with one of its delegated powers, but as long as it is exercising a delegated power its power is as complete as that of any sovereign and it may exercise it within the limits of the States (Cherokee Nation v. Kansas Railway Co., 135 U.S. 641, 565; U.S. v. Fox, 94 U.S. 315,320). These principles, so long established and so often discussed, need no further reiteration.

The power of eminent domain extends to all kinds of property, real or personal, tangible or intangible. In other words all private property is held subject to the necessities of government. (U.S. v. Lynah, 188 U.S.445,465; Cooley, Const.Lim.,8th Ed.P.1113; and cases cited there; Long Is.Co. v. Brooklyn,surpa, at P.689). However, there is some difference of opinion as to whether money may become the subject of eminent domain (Cooley, supra, P.1118), and there is strong dicta to theeffect that it may not be taken in that way. No case appears where the question was squarely raised but in Bennett v. Sacramento (12 Cal.76,83), Judge Field (later of the U.S. Supreme Court) said, "money is not that species of property which

sovereign authority can authorize to be taken in the exercise of its right of eminent domain". (See also Hammett v. Phil.,65 Pa.146, Cooley, supra; 20 C.J. 588; People v. Mayor of Brooklyn, 4 N.Y.419, 424; where the Court admitted it was dicta; Emery v. San Francisco Gas Co., 28 Cal.345,351; Cary Library v. Bliss, 151 Mass.364,378,379). If these opinions are the law, then Congress could not authorize the requisition of any gold coins or currency, but in my opinion, they are not authority for the present case. This is so because: 1.They are all dicta and rose in State Courts on question of states' powers, and by the Constitution, the States have no direct control over currency, Art.1,Sec.10,and hence it might weel be said that no State could have any rights of eminent domain over currency; 2. Judge Field based his argument on the grounds that compensation must be made or a fund provided for it in advance, which, as we shall see, post, is erroneous and does not apply here anyway; 3. The questions all arose out of taxation cases and the basis for argument was that the government can always get money by taxation. The latter clearly is not the present status, for here the government is not trying to get money but rather to protect it. In addition, all that these cases did say was that in times of grave necessity, it might be proper. As to the power of the States at such times a guess need not now be hazarded but it seems that none of the reasons raised by the above cases apply here and that since money is property (Pirie v. Chicago Title and T.Co.,182 U.S.428), and because of the broad powers of Congress over currency and the flat statements in the cases that all private property can be taken, it would seem that Congress could authorize the taking of even gold certificates. (For a list of cases showing the kind of property that has been taken see Campbell v. Bank, 5 F.Supp. 156,171,172).

Congress can delegate the actual taking to an officer of the Government (Kohl v. U.S., supra, where the Sec. of Treas. being authorized to purchase a site for a post-office was held to have power to condemn; Chappell v. U.S.,160 U.S.499,510,light house; U.S. v. North American Co., 253 U.S.330; this latter case likewise being authority for the rule that the property must be taken by the proper authorized official, in order to be able to sue the government). Congress can even create a corporation for the purpose (Luxton v. North River Bridge Co., 153 U.S. 525). Thus in this case it was proper for Congress to bestow the authority on the Sec. of the Treas. as an appropriate means of executing a delegated power. (Cal. v. Pacific Railroad, 127 U.S. 1).

As we have seen, the property must be taken for a public use. Whether the use is a public one or not is a question for the court, (Shoemaker v. U.S.,147 U.S.282,298), but if that question is decided in the affirmative, the judicial function is exhausted and the extent to which such property shall be taken for such use rests wholly in the legislative discretion, same case, and Rindge Co. v. Los Angeles County,(262 U.S. 700). In Joslin v. Providence, (262 U.S.668, 677) the court said, "that the necessity and expediency of taking property for public use is a legislative and not a judicial question is not open to discussion." (See also Adirondack Railway Co. v. N.Y. 176 U.S.335,349; Boom Co. v. Patterson, supra; U.S. v. Gettysburg El.Ry.Co.,160 U.S.668,685). Here we have seen the use is a public

one, i.e., to protect the currency. There is therefore no further judicial question as to the necessity or expediency of the use under these authorities.

It seems that the most difficult problem presented under this subject is whether just compensation is being made and whether the due process clause is being violated, for as was said, supra, these are essential conditions imposed on the exercise of any power by Congress (U.S. v. Lynah, 188 U.S.445). In the first place we must consider the method of taking and all authorities hold that this is purely a legislative question (Monongahela Navigation Co. v. U.S., 148 U.S.312,325). Due process does not guarantee any particular method of procedure, so there is no absolute right to trial by jury, nor a right of appeal - its requirements are satisfied if the claimant has notice and reasonable opportunity to be heard and present his claim or defense (Dohany v. Rogers, 281 U.S.362,369; U.S.v.Jones, 109 U.S.513).

In U.S. v. Great Falls, Mfg.Co.,(112 U.S.645,656) the Court raised the question as to whether a person could enjoin governmental agents from working on his property if there had been no formal proceedings condemning it, but the court refused to answer it then. However, recently, the question was squarely presented when action was started to enjoin the Sec. of War from starting work under Miss. R. Flood Control Act without first condemning (Hurley v. Kincaid, 285 U.S. 95). Justice Brandeis, speaking for the court, which denied the injunction, said, (P.104) "For even if the defendants are acting illegally under the Act in threatening to proceed without first acquiring flowage rights over claimants' lands, the illegality is confined to the failure to compensate him for the taking and affords no basis for an injunction, if such compensation may be provided in an action at law. Such compensation may be obtained in an action at law, for, even though, compensation is not provided for or paid in advance, yet when the Government takes private property for the public use, it impliedly contracts because of Fifth Amendment to make just compensation (Dohany v. Rogers, 281 U.S. 362,366; U.S. v. Lynah, supra; Kohl v. U.S., supra; Campbell v. U.S., 266 U.S.368; U.S. v. Cress, 243 U.S.316; see also Joslin Co. v. Providence, 262 U.S. 668,677; U.S. v. Great Falls Mfg.Co., 112 U.S.645; U.S. v. Palmer, 128 U.S. 262). The claim may be pressed in the U.S.Court of Claims (Philips v. U.S., 274 U.S.341; Duckett v. U.S., 266 U.S.149,151) though not if the taking is a tort or under a claim of title (U.S. v. North Amer.Co., supra; Langford v. U.S., 101 U.S.41; Tempel v. U.S., 248 U.S.121,130). The Fifth Amendment does not entitle a claimant to be paid in advance (Hurley v. Kincaid, supra; Crozier v. Krupp, 224 U.S.290,306). The impairment of contracts clause does not prohibit the right of eminent domain, for contracts really are taken with the property with which they are connected (Long Is.Co. v. Brooklyn, 166 U.S. 685,689; West River Bridge Co. v. Dix, 6 How.507; Charles R.Bridge case, 11 Pet.420; Cincinnati v. Louisville & N.R.Co. 223 U.S.390).

The Fifth Amendment does demand that just compensation be made, and what is just compensation is a judicial question and cannot be decided by the legislature (Nichols, Eminent Domain 1917, P.946, and cases there cited; Monongahela Nav.Co. v. U.S., 148 U.S.312,327; Charles R.Bridge Co. v. Warren Bridge Co., supra, at 571). As early

as 1895 the court declared that "no just compensation can be made except in money (unless person consents to something else). Money is a common standard by comparison with which the value of anything may be ascertained. It is not only a sign which represents the respective value of commodities, but it is an universal medium, easily portable, liable to little variation (sic), and readily exchanged for any kind of property" (Van. Horne's Lessee v. Corrance, 2 Dall (C.C.Pa.D) 304, 315; see also Butler v. Sewer Commissioners, 39 N.J.L. 665; Cooley, Const.Lim., 8th Ed. 1201; Dillon Mun.Co.Sec.47)

Certain rules as to what is just compensation have been laid down by the courts. The underlying principle for these rules is that "The owner is entitled to the full money equivalent of the property taken, and thereby to be put in as good position pecuniarily as he would have occupied if his property had not been taken" (U.S. v. New River Collieries, 262 U.S. 341,343; Seaboard Airline,Ry. v. U.S.,261 U.S.299). Thus the owner is entitled to what he lost by the taking, not what the government gained (Brooks Scanlon Corp. v. U.S.,265 U.S.106; and same cases). If there is a market value for the property prevailing at the time and place of taking, that price is just compensation (Vogelstein v. U.S.,262 U.S.337; U.S. v. Chandler Dunbar Water Power Co.,229 U.S.53; Boom Co. v. Patterson, supra). The market value may be determined with references to the use for which the property is plainly adapted. (Boom Co. v. Patterson,supra)

After this statement of the fundamental rules it is necessary to apply them to the statute under consideration though the question was not really raised by the facts of the Campbell case. This act says that compensation is to be made by an equivalent amount of any other coin or currency issued under the laws of the U.S. As far as gold coins and gold certificates are concerned, this is probably a just compensation as it really is just exactly the same as if land were taken and paid for in depreciated dollars. However, there may arise grave doubt that the Court will consider that the price set for gold bullion is just. In order to present this question properly it is necessary to consider briefly its history. On April 5,1933, it is estimated there was $1,000,000,000 in gold outstanding which was rapidly leaving the country. (Ill.Law Rev.,Feb.1934, note P.828) On April 19, 1933, an embargo was declared on gold. This meant that no gold could be shipped from the country, thus doing away with the foreign market; and there was no domestic market under the Executive Order of April 5,1933. In other words, the Government by its decree had done away with any available market for gold except the Government itself. Then it set a price of approximately $20.00 an ounce which it would pay for gold and it had ordered that all gold be turned over to it. So, it can be seen, a rather anomalous situation was created. At the same time, in Europe, gold was selling at around $30.00 an ounce (id). Under the rules we have laid down, the market price is considered just compensation by the Courts and since the only market was the Government it might be said that private owners were properly compensated by the price the Government paid. There is the further argument that any loss might be considered as incidental to the exercise of the power over currency. Seemingly however, these arguments fall short of the real problem, for the Legislature itself has caused the lack of market, by prohibiting the

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exporting of gold and of all private transfers within the county. If it can be said that it can create such a situation and then set its own prices for the gold with no judicial review of the price, it would seem that the safeguards raised by the Constitution are being overridden. This is not to say that the act is unconstitutional, but rather, the better argument is that, though the Government has set a price which is really the only market price, nevertheless, the courts have the right to determine whether that price is just or not. Especially may this be said to be true in view of the holding in the U.S. v. New River Collieries case, supra, where the court held that the market value was that of the foreign market for coal taken during the war when the company was engaged in exporting business. The rule is that just compensation is a judicial question so it seems that the courts might declare that the price set for gold was not reasonable, taking into consideration all the circumstances. As has been said, the question was not raised in the Campbell case but it is an essential consideration to any treatment of the Act.

The third argument against the Act is that it is a delegation of legislative powers to the President. It is a settled maxim of constitutional law "that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority (Cooley 224, and cases there cited; Field v. Clark, 143 U.S. 649,692; Willoughby, 1929, p. 1636). The reasons usually given for this rule are (1) that it is inconsistent with the doctrine of separation of powers, (2) the agency principle of delegatus non potest delegari, or, in other words, that the legislature having had the power delegated to it, cannot grant the trust and confidence bestowed on it to another.

The questions arise when Congress makes a statute and leaves the execution of it to the executive or boards, for the line between what is legislation and what is administration has never been drawn definitely. (In re Griner, 16 Wis. 423, 437). The rules as laid down by a long line of decisions are simple enough in themselves, but the difficulty comes in applying them to a given case. The underlying principle for these rules must depend on the definitions of legislation and administration. It seems that the legislative power is that of choosing a policy, while administration is to put that policy into execution. Thus the courts havesaid that when Congress has declared "the policy of the law" and fixed "the legal principles which are to control in given cases," it may invest the executive with "the power to ascertain the facts and conditions to which the policy should apply" (Mutual Film Corp. v. Ohio Ind.Com.,236 U.S.230, 245). Further, it may enact general principles and direct an executive officer to fill up the details. (Field v. Clark, supra; Red "C" Oil Mfg.Co. v. N.C.,222 U.S.380,394; Chappell v. U.S.,160 U.S.499,510; Union Bridge Co. v. U.S.,204 U.S. 364,377). As was said in Interstate Com.Comm. v. Goodrich Transit Co., (224 U.S.194 at p. 214), "The Congress may not delegate its purely legislative power to a commission, but having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the inve stigation of facts with a view to making orders

in a particular manner within the rules laid down by the Congress." Often quoted are Cincinnati etc. RR. v. Comm., (1 Ohio St.77,88), where the court said "The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution"; and Moers v. Reading (21 Penn.St.188,202), "The legislature cannot delegate power to make a law, but it can make a law to delegate a power to determine some facts or state of things upon which the law makes or intends to make its own actions depend. To deny this would be to stop the wheels of government" (see also Locke's Appeal, 72 Penn.St.491,498). Innumerable quotations to the same effect could be set forth here, but they would serve no purpose; it may be seen that no definite rule is laid down - general principles are state but that is as far as the courts will go. In effect they say: If the policy is clearly asserted and the standards sufficiently definite to enable the courts to determine whether the administrative officers are keeping within the power delegated to them, then there is no delegation of the legislative function. Thus each case must depend on its own facts; though it would seem that the policy of the courts in each case is to declare there can be no delegation, assert the general principles and permit the delegation usually on the necessities of government. It is interesting to note that in no case has the U.S.Supreme Court declared an act unconstitutional as a delegation of legislation. (Merritt v. Welsh. 104 U.S.694; Morrill v. Jones, 106 U.S.466; U.S. v. Eaton,144 U.S. 677 are often cited to the contrary but these cases have often been distinguished and the acts were not declared unconstitutional in those cases but rather it was held that the administrative officer in each case overstepped the bounds set by the legislature).

Though each case must be decided on its own facts, to present the problem more clearly, it is necessary to examine a few of the leading cases, in order to see the attitude the Court takes in considering the questions. The first case to arise was The Brig Aurora, 1813,(7Cranch 382) where the Court upheld an act prohibiting the importation of goods from France and Great Britain; which act would be revoked by Presidential proclamation, if he found these countries had modified or revoked their edicts. The leading precedent in the Supreme Court is Field v. Clark,1891, (143 U.S.649, Justice Harlan writing for the Court with two Justices dissenting). The Court reviewed all the acts passed up to that time (pp.681-693) and placed great weight on these as showing the practical application of the problem, even though there had been few decisions on them. The Act there in question, for the purpose of securing reciprocal trade with countries producing and exporting sugar, molasses, etc., suspended the tariffs on these articles, but declared that the President, when he discovered any country imposed exactions or duties "which he found to be reciprocally unequal and unreasonable, could suspend the act," in which case certain set duties were then to go into effect. On the principles we have laid down above, the court declared that the Act did not delegate the legislative power, for, it said, that was exercised when the Congress declared the suspension should take effect as a named contingence. Suspension became necessary as soon as the President ascertained the existence of a particular fact, and in ascertaining that fact it cannot be said he was exercising the function of making laws (id.p.693).

Standards that have been upheld as certain and defnite enough are: (1) "Only such films may be shown as are, in the judgment and discretion of the board, of a moral educational or amusing and harmless character" - court saying "The terms get precision from the sense and experience of men and become certain and useful guides" (Mut. Film Corp. v. Comm., supra, at p.245); (2) All tea declared by Board of Tea Experts to be "inferior in purity, quality and fitness" is prohibited (Bruttfield v. Stranahan, 192 U.S. 470,496); (3)When Secretary of War "shall have reason to believe a bridge is an unreasonable obstruction to free navigation of navigable waters" (Union Bridge Co.v. U.S., 204 U.S.364; Hannibal Bridge Co. v. U.S., 221 U.S. 194; cf.Wisconsin v. Ill.,278 U.S.367,414); (4). The limit was said to have been reached when the Court upheld the Tariff Act of 1922, which provided that when the President discovered that our industries are endangered because of the difference in cost of production here and abroad, he might raise the tariff on certain articles. He was to have the advice of the Tariff Comm., and a list of things to be taken into consideration such as wages, prices, etc., were furnished. This case being the most recent (1927) the declaration of the Court on the subject is of great importance. The Court reiterated the old principles, declaring that the Congress could vest discretion in officers to make public regulations interpreting a statute and directing the details of execution even to extent of penalizing a breach of such regulations; that if Congress lays down an intelligible principle and policy to which the officer must conform, it can vest the application and enforcement of the policy in such officer (p.406). This case is also authority for the rule that violations of the regulations and rules may be made punishable criminally as in the present Act. (Also, in re Kollock, 165 U.S. 526, U.S. v. Bailey, 9 Pet.238; U.S. v.Grimaud, 220 U.S.506;McKinley v. U.S.,249 U.S.397;Avent v. U.S. 248 U.S. 397). It seems that such statutes will be more strictly construed (Ellingwood Ill. L.Rev.Feb. p.745; Willoughby, p.1646-1651); but the cases seem to hold merely that there must be a direct assertion of Congress that such rules should be punishable (U.S. v. Grimaud,supra) for other examples of acts that have been sustained see; St.Louis etc.Ry. v. Taylor, 210 U.S. 281; U.S. v.Chemical Foundation, 272 U.S. 1; Chappell v.U.S. 160 U.S. 499,510; Oceanic St.Nav.St. v. Stranahan, 214 U.S. 320; Miller v. U.S., 109 U.S. 385; 12 C.J. 839).

The cases that arise under this question may be grouped into two general classes of (1) public utility regulation, especially commerce control and rate regulation; and (2) customs and tariff duties, since, because of their very nature, these problems could not be solved by Congress alone the courts seem to have adopted a rule of necessity as a reason for upholding a delegation. In all these rate, tariff, etc., cases the courts will frequently declare that to hold otherwise would be imposing an unconscionable burden on the legislature - that the problems of government are becoming so complex and intricate, that only experts, devoting their entire time to the problems, could solve them. (Hampton Co. v. U.S.,supra, p.406; Moers v. City of Reading, supra,p.694; Mut.Film Corp.v.Ind., Comm.,supra,p.245). This rule has been the subject of much discussion and many think that the courts should either go the whole way and have the legislature merely set a plicy, leaving all the

general details to the administrator. The rule, as it is, is too vague and uncertain to be of much value in any given case. The tendency of the recent decisions is to lay greater emphasis on this rule of necessity and it seems that the courts will go a long way to sustain enactments although they appear to be delegations. (For an interesting discussion and attack on the policy see Cheadle Delegation of Legislative Function, 1918, 27 Yale L.J. 892).

Applying these rules, it would seem that a cogent argument could be made against the Act in question, and it may well be said that the limit has been reached. The question is not one demanding expert supervision or advice; the President is not only given power to declare on what contingency the act is to go into effect, but also there is left to him entire discretion in making of rules and regulations. However, in view of the tendency of the court to sustain such acts, it hardly seems as though the court would declare this unconstitutional. It would be a startling precedent in view of the recent liberal decisions, and in view of the fact that the Congress really has declared a policy - that the holding of gold should be regulated even to prohibition, and the contingency for it going into effect is during time of war or when the President declares an emergency exists. In doing this it falls within the rules.

Judge Woolsey in the Campbell case held the Act constitutional but declared that the wrong officer (the President instead of the Sec. of Treas.) executed the power and so he sustained the demurrer to the indictment for failure of Campbell to turn over his gold under the executive order. It is true that the officer to whom the power has been given is the only one who can use it, (U.S. v. North American Co., 253 U.S. 33), but it seems he might have sustained the execution here. This because the President was given authority to make rules prohibiting the holding of gold, and by implication the power to requisition it. If a person could not hold it, what is he to do? However, reasons not given in the case for holding as he did are: That failure to comply with the President's orders was made punishable by imprisonment while failure to comply with the Secretary's order was only punishable by a penalty of twice the gold holdings, and under the strict construction given criminal enactments, such a holding would be proper; that the President's power was in rem, ie., against the gold, while Secretary's was in personam; that the Secretary's power was given expressly by Sec. 3, and President's only impliedly by Sec. 2; and that seemingly Congress did not intend that two persons should have the same power.

Certain other problems are also raised by this case which space prohibits considering. In brief these are; 1. is the word "hoarding definite enough to be the basis of criminal proceedings - held it was (see U.S. v. Cohen Grocery Co., 255 U.S. 81). (2) can the Congress require a return of holdings of gold without violating the constitutional prohibition against self incrimination - held the question was not raised here, as Campbell, if he wished to challenge the Act should have filed a return and then done so instead of abstaining from making a return. (See: U.S. v. Sullivan, 274 U.S. 259). Of course this ruling avoids the direct question, but, (3). If a person has contracted to pay a debt in gold, is he freed from

this obligation by reason of the fact that the holding of gold is no longer legal (Burison v. Rhodes, 7 Wall.229; Trevilcock v. Wilson, 12 Wall. 687, which empowered such obligations in the legal tender era would not be in point, it seems, because of the illegality of holding gold).

From this discussion it may be seen that the Gold Hoarding Act raised many nice and several novel constitutional questions. If, at first glance, it appears that the Congress overstepped its bounds, a review of the authorities shows at least that there are powerful arguments in favor of validity.

Jacob H. Herzog

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EVIDENCE

I. HUSBAND AND WIFE

The age-old legal rule that a wife may not testify at the trial of her husband was reversed recently by the Supreme Court of the United States, which held that the wife of a defendant in a criminal case in a Federal Court is a competent witness in behalf of the husband.

The case which brought this momentous decision was Funk v United States (Vol. 78-No.4 L.Ed.231) in which the defendant Funk appealed from the ruling of the Federal district court, where he had been twice tried and convicted upon an indictment for conspiracy to violate the prohibition law, which excluded his wife from testifying in his behalf upon both trials on the ground of incompetency.

The law upon which the trial court founded its decision was established many generations ago. It may be noted that in the trial of Lord Audley (3 St. Trials 402) which took place in England in the year 1631 the unity of person and interest of husband and wife was recognized. Lord Mansfield in his opinion rendered in the case of Bentley v. Cooke (3 Doug. 422) stated that there never had been a time when a husband or wife was permitted to testify either for or against the other, except where a particular necessity existed such as where a wife would be left without a remedy for personal injuries received from the hands of her husband. The case of Barbat v. Allen (7 Ex. 610) also held to the incompetency of a husband or wife to testify either for or against the other. In support of the doctrine Davis v. Dinwoody (4 T.R. 678) was cited in which Lord Kenyon,C.J., upheld the doctrine on the ground that such a bias was bound to exist in the mind of either spouse that their testimony could not be permitted. Percival v. Caney (Ct. of Ch. 1852) was also cited, in which case Lord Truno, in delivering the opinion, stated, "The long established rule of law is that a wife cannot be examined for or against her husband, and no alteration has yet been made in that established rule of law. It is a rule founded on a principle which is more valuable even than the administration of justice - the necessity of preserving the confidence and happiness of domestic life." (Sharswoods' Blackstone's Commentaries, Vol. I, page 443; Hawk K.P.C. 3). It has been recognized that the marital status is the basis of our social life and that the confidence existing between husband and wife should be sacredly guarded and so as a matter of public policy they should not be allowed to testify for or against each other. (Greenleaf on Evidence, Vol. I, page 472, 15th ed; Stein v Bowman, 13 Peters 223; Barker v. Dixie, Cas. Temp. Hardw. 264; Com. v. Marsh 10 Pick. 57; Chamberlain v. Peo., 23 N.Y. 85). It was even held that the promotion of a perfect union of interests and of mutual confidence is so essential to the welfare of society that although the wife has been divorced for her adultery she is not competent to give evidence which would have been excluded had the marriage continued. (Philips on Evidence, Vol. 1, page 65, 1st Am.Ed.; Monroe v. Twisleton, cited in Aveson v. Lord Kinwood, 6 East 192).

The State of Connecticut in 1848 removed the common law disability of a wife to testify in cases where her husband was a party and this was extended to criminal as well as civil trials. However this was found injurious to the party charged with a crime and so the law was repealed the next year. (Lucas v. State, 23 Conn. 18). Judge Mullin, in his opinion of the case Mattesan v. N.Y.Cent. RR.Co., (62 Barb. 364), which was decided in 1862, discussed a statute recently passed in New York which made a husband and wife competent witnesses, for or against each other. Judge Mullin characterized the statute as not only unwise but "vicious the most fatal stab at the peace and good order of the State that was ever inflicted". He also pointed out that in the eyes of the law the husband and wife are no longer one person with common interests, common sympathies and a common destiny but that they have now been forced to become merely two persons who have formed a partnership.

It has been feared, if a wife was allowed to testify for her husband but not against him, that she would find herself, too often, forced to chose between her duty to her God and her duty to her husbandwhom she has promised to love, honor and obey. (Kelley v. Proctor, 41 N.H. 139).

Although most courts applied the common law strictly, where it had not been modified by statute, it was not always without some feeling that perhaps a change would be beneficial. Lord Campbell, C.J., in Stapleton v. Crofts, (18 Q.B. 367, 1862), held the rule absolute and arbitrary but in writing the decision he expressed his own opinion in that the law should be changed to allow a husband and wife to testify for or against each other, subject to the limitation that they not be permitted to disclose any privileged communications.

Relevant evidence should be permitted despite the relation which the witness may occupy towards the party that by thus opening the doors the judicial tribunals may better be able to act justly. (The modern Law of Evidence - Chamberlayne Secs. 3632, 3660).

In the federal courts of the United States the question of the competency of a witness must be determined upon common law principles except so far as those principles have been modified by federal statute or the decisions of the federal courts (U.S. v. Sims, 161 Fed. 1008). The federal courts have repeatedly held to the common law disabilities including the rule that a husband or wife could not testify for or against each other, basing their decisions upon the ground that public policy would not allow such testimony. (Stein v. Bowman, 19 Pet. 209; Bassitt v. U.S., 137 U.S. 496; Logan v. U.S., 144 U.S. 263; Hendrix v. U.S., 219 U.S. 79).

However, there has been a tendency in both England and America to regard the domestic confidence as of little consequence compared with the public benefit of obtaining all of the facts in each case before the court. It is though, that by hearing all intelligent people who know the facts and then making due allowance for circum-

stances affecting each one's credibility, the ends of justice will be met with more expediency. (Appeal of Robb, 98 Pa.St. 501). The fact of the relationship of a witness to the accused may be considered as bearing upon his or her credibility, but the relationship should not cause the evidence of the witness to be regarded with suspicion or scrutinized with more than ordinary care. If believed, a wife's testimony should have the same weight as that of any other witness. (St. v. Guyer, 61 Ia. 263; St. v. Bernard, 45 Ia. 234; St. v Lingle, 128 Mo. 528; St. v. Young, 105 Mo. 634).

The case of Benson v. U.S. (146 U.S. 325) decided in 1892 and upon which the present Supreme Court partially based its opinion is very illustrative of the growing feeling that the common law disabilities were becoming a hinderance to justice. To quote from the opinion in the Benson Case, supra, the court in part said: "The theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors. But the last fifty years have wrought a great change in these respects, and to-day the tendency is to enlarge the domain of competency and to submit to the jury for their consideration as to the credibility of the witness those matters which heretofore were ruled sufficient to justify his exclusion. This change has been wrought partially by legislation and partially by judicial construction." After calling attention to legislation passed by Congress in 1864 which removed the disability of a witness to testify because of interest and also the legislation of Congress of 1878 which made the defendant in any criminal case a competent witness at his own request the court continues; "Legislation of similar import prevails in most of the States. The spirit of this legislation has controlled the decisions of the courts, and steadily, one by one, the merely technical barriers which excluded witnesses from the stand have been removed, till now it is generally, though perhaps not universally, true that no one is excluded therefrom unless the lips of the originally adverse party are closed by death, or unless some one of those peculiarly confidential relations, like that of husband and wife, forbids the breaking of silence."

Another barrier to witnesses was removed by Congress by the enactment of the Federal Criminal Codes in 1909 by which act the disability of witnesses convicted of perjury was removed (Rev.Stat.Sec.5392 repealed). This was a definite move ahead for this common law disability survived many of the others in various jurisdictions.

The Supreme Court in 1917 again asserted, in the case of Rosen v. U.S., (245 U.S. 467) that it was not bound by the common law as it existed many years ago but was to apply it in the light of modern conditions and environment.

Bearing in mind that the Benson Case, supra, distinctly excepted husbands and wives from parties who had been granted a place in the courts as witnesses for each other, the Court in Funk v. U.S., supra, removes this disability.

Although extensive, the following quotations form a clear picture of how the ever living common law was changed in the latter case. Mr. Justice Sutherland in delivering the opinion of the court, said, in part: "The rules of the common law which disqualified as witnesses persons having an interest long since in the main have been abolished both in England and in this country; and what was once regarded as a sufficient ground for excluding the testimony of such persons altogether has come to be uniformly and more sensibly regarded as affecting the credit of the witness only. Whatever was the danger that an interested witness would not speak the truth -- and the danger never was as great as claimed -- its effect has been minimized almost to the vanishing point by its test of cross-examination, the increased intelligence of jurors, and perhaps other circumstances. The modern rule which has removed the disqualification from persons accused of crime gradually came into force after the middle of the last century, and is today universally accepted. The exclusion of the husband and wife is said by this court to be based upon his or her interest in the event. (Jin Fuey Moy v. United States, 254 U.S. 189).

"Nor can the exclusion of the wife's testimony, in the fact of the broad and liberal extension of the rules in respect of the competency of witnesses generally, be any longer justified, if it ever was justified, on any ground of public policy. It has been said that to admit such testimony is against public policy because it would endanger the harmony and confidence of marital relations, and, moreover, would subject the witness to the temptation to commit perjury. Modern legislation, in making either spouse competent to testify in behalf of the other in criminal cases, has definitely rejected these notions, and in the light of such legislation and of modern thought they seem to be altogether fanciful. The public policy of one generation may not, under changed conditions be the public policy of another (Patton v. United States, 281 U.S. 276).

"The fundamental basis upon which all rules of evidence must rest- if they are to rest upon reason- is their adaptation to the successful development of the truth. And since experience is of all teacher the most dependable, and since experience also is a continuous proces it follows that a rule of evidence at one time thought necessary to the accertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule."

The abrogation of this time honored rule by the Supreme Court of United States should impress upon those who might doubt the elasticity and the applicability of the common law that no rule of common law can survive the reason upon which it is founded and that no statute or legislation is required to change it but that it abrogates itself.

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II. SILENCE OF DEFENDANT WHILE IN CUSTODY

The recent decision in the case of People v. Pignatano (263 N.Y. 229,236) has again called the attention of the legal profession to the fact that a rule of evidence in the State of New York has been changed so that now a person in custody accused of a crime is under no duty to speak and that his silence, during accusations in his presence, cannot be interpreted as giving assent to the charges.

For many years the rule as laid down in the case of Kelley v. People, (55 N.Y. 565,571) was followed in this and other States. The court in this case held in part, "Where an individual is charged with an offense, or declarations are made, in his presence and hearing, touching or affecting his guilt or innocence of an alleged crime, and he remains silent when it would be proper for him to speck, it is the province of a jury to interpret such silence and determine whether his silence was, under the circumstances excused or explained. At most, silence under such circumstances is but an implied acquiescence in the truth of the statements made by others, and thus presumptive evidence of guilt, and in some cases it may be slight, except as confirmed and corroborated by other circumstances. ****They (defendants) were for all practical purposes parties to the discussion. The declaration was in substance a challenge to them to assert their innocence if they were not guilty."

Any response to such a challenge would be admissible in evidence and so an omission to make any reply or to notice it, like other acts of the party, should be given to the jury for interpretation. The implication of assent to a statement affecting the guilt or innocence of an individual, from an omission to contrvert, qualify or explain it, arises from the fact that a person knowing the truth or falsity of a statement affecting his rights, made by another in his presence, will naturally under circumstances calling for a reply, deny it, if he be at liberty to do so, and does not intend to admit it, (Donnelly v. State, 2 Dutcher, N.J.R. 601; Finch v. Comm., 29 Ky.L.R. 187),for a confession or admission may be implied from the conduct of the accused. (Davis v. State, 131 Ala. 10).

The ground, upon which evidence of admissions by failure to reply to accusations was admissible, was that the silence of the accused when he may and naturally would speak in denial of the statements imputing guilt, if untrue, was regarded as an acquiescence and ratification of the statement and adopted as his own. (Ackenson v. People, 124 Ill. 563; Merriweather v. Com.,118 Ky.870). Since it is contrary to a man's very nature to admit anything which is untrue and against his own interest it has been held that a statement made in the presence of a person charged with crime will be presumed, in the absence of any indication to the contrary, to have been made in his hearing also, where he was near enough to have heard it. (Hochrieter v. People, 2 Abb.Dec. 363; State v. Wilkins, 66 Vt. 1).

The rule was not arbitrary in that any declaration made, to which the accused made no reply, was to be considered an admission for the circumstance of silence under accusation might be taken into consideration by the jury as a matter of evidence in determining

whether the defendant intended to acquiesce in the truthfulness of the statement. Nor did the presumption of acquiescence arise when the silence of the accused was of a character which did not justify the inference that he should have spoken. (People v Koerner, 154 N.Y. 355).

It has also been held that a defendant's silence could not be an admission when he was accused in a language foreign to his own or which he did not understand and he did not know that he was being accused (People v. Cascone, 185 N.Y. 317; People v. Lewis, 238 N.Y. 1, 5); or when the statements were made during or in the course of judicial proceedings (People v. Willett, 92 N.Y. 29); or when the accused was intoxicated (Lanengan v. People, 39 N.Y. 39); unconscious or shamming unconsciousness (People v. Koerner, supra); or when the district attorney sought to examine him and he refused to answer by advice of counsel (People v. Conrow, 200 N.Y. 356,367); or when silence was forced upon him by his custodians (People v. Kennedy, 164 N.Y. 449). It also had to appear that the accused had not only an opportunity to speak for himself, but was in a situation where it would have been fit, suitable, and proper for him, or he would have been likely, according to common experience, to have done so. (Com. v. Harvey, 1 Gray 487).

In the opinion of the case of People v. Kennedy, supra, the court, basing its decision upon existing authorities, seems concisely to have stated the rule as it existed at that time. It was there held that, "declarations or statements made in the presence of a party are not received as evidence in themselves, but for the purpose of ascertaining the reply the party to be affected makes to them. They are only competent when the person affected hears and fully comprehends the effect of the words spoken and when he is at full liberty to make answer thereto, and then only under such circumstances as would justify the inference of assent or acquiescence as to the truth of the statement by his remaining silent" (Wharton Law of Evidence, Sec. 1136,1137; Greenleaf on Evidence, Sec. 197-199; People v. Koerner, supra; Kelly v. People, supra; Gibney v. Marchay, 34 N.Y. 301,305; People v. Willet, supra). The Court of Appeals in the case of People v. Marendi (213 N.Y. 600,613), practically speaking, overruled the Kelley Case, supra, in applying the law to following existing facts. The defendant while incustody of three police officers was taken before the dying victim with whose shooting the defendant was charged. It was testified that the victim tried to speak and pointed to the defendant, and the defendant "mumbled and bit his teeth together", and that "he sort of mumbled something in Italian" which no one present could interpret. The Court pointed out that the sole purpose of the testimony was to infer that the defendant shot the victim but that his, the victim's, act was not offered as a dying declaration and that it was seriously prejudicial to the defendant as an independant fact. Not being a dying declaration, it was admissible only in connection with some act, declaration or response of the defendant in the nature of an admission. The Court then went on to say that even if the defendant remained silent such could not have been construed as an admission, because he was then under arrest and not called upon to speak or deny any accusation (People v. Smith, 172 N.Y. 210,234).

It will be noted from the above cases that there was a tendency to make exceptions to the rule and to grant the accused all rights possible so that his silence would not be held against him. It was not until the case of People v. Rutigliano (261 N.Y.103) followed immediately by People v. Dolce (261 N.Y. 108), that the Court of Appeals definitely overruled the case of Kelley v. People, supra. In the former case the defendant Blumenthal made statements against the appellant when both were in custody at police headquarters, which statements implicated the applellant as the leader and instigator and master-mind of the plot to kidnap Charles Rosenthal. Although the statements were made in the presence of the appellant he remained silent. The trial court held the evidence of such silence admissible against the appellant as tending to show guilty participation in the crime, basing its ruling on the case of Kelley v. People, supra. However the Court of Appeals chose to bring the New York rule in line with that of the State of Massachusetts as stated in the case of Commonwealth v. McDermott (123 Mass.440) which is as follows: "A person who is held in custody on a charge of crime, jointly with another is not called upon to contradict statements prejudicial to him, made in his presence by the other person, in answer to inquiries made by an officer; and such statements though not contradicted by him, are not admissible as evidence against him."

The court goes on to say in the Rutiglano Case, supra, that "no cautious person, when in custody, accused of crime would care to enter into a discussion of his guilt or innocence with his captors or co-defendants, when what he said might be used against him.**** He is then under no duty to speak and his silence should not be counted as giving assent to what he hears. If he had counsel, he would doubtless be advised not to talk. If he had not, he should not be prejudiced thereby."

This rule which seems to be by far the more just is also followed by other states, (State v. Munston, 35 La.Ann. 888; Quinn v. State, 39 Tex.Crim.R. 257). A person, therefore, in actual custody accused of crime, and whether warned or not by the authorities, is not supposed to be surrounded by circumstances such as afford him an opportunity freely to act or speak when an accusation is made against him; and his silence in such case cannot be used against him.

Francis A. Bolles

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LANDLORD AND TENANT - BAILMENT

In the recent case of Ridgely Operating Co. v. White, (150 So. 693), the Supreme Court of Alabama has held that the relation of landlord and tenant imposes upon the landlord the liabilities of a bailee for property of the tenant which is left in the hall of an apartment house owned by the landlord. Obviously such a rule may easily result in a severe hardship to the landlord. The facts of the case present a situation that is frequently apt to happen.

The appellee, White, acting by a friend, Mrs. Meeds, first made an oral agreement to rent an apartment in the "Ridgely", an apartment house, owned by the Ridgely Operating Company. It was a large building used sometimes to accomodate transients; but apartments were also leased in all respects as separate unit residences. Apartment tenants, as the plaintiff, provided their own furniture and equipment for house keeping. The halls, lobby, stairways, entrances, and elevators were under the management and control of the defendant. The plaintiff's apartment was on the seventh floor, and the door to it was near the freight elevator. Mrs. Meed had rented the adjoining apartment, and she and the plaintiff had arranged to occupy the apartments as one family. The plaintiff remained at her former residence while her effects were beingtransported to her apartment, and Mrs. Meed was at the new place to receive them. The trunk came in the first truck load, and was taken to the seventh floor in the freight elevator, with the other effects. The men doing the hauling left them all in the hall, and went for the second load. Mrs. Meed moved all the effects, except the trunk, into the apartment. She was helped by a strange negro man not employed by the defendant or the truckman. When the men returned with the second load, the trunk was gone. How it was removed from the building does not appear. Many negroes were employed by tenants of the apartment house, and used the freight elevator.

It was held that these facts showed a constructive possession of the plaintiff's trunk in the defendant; that "the corridors and other such places are under the same nature of supervision by the apartment owner as the rooms and other places of a boarding house, and entail the same nature of duty upon one operating it"; that under these circumstances the relation of bailor and bailee was established, and, since the defendant failed to explain the loss, it was liable therefor.

A few points of law and fact should be observed before a further discussion of the case. It appears that the men bringing the trunk etc., were employed by the plaintiff herself, and that Mrs. Meed apparently took charge of the goods as soon as they arrived. There is no evidence that the employees, or agents, of the defendant ever took over, or received, the property at any time. The court was a bit vague in stating exactly what the relation was between the plaintiff and defendant upon the entering into the agreement as to taking the rooms. It would seem that the plaintiff was considered as a boarder; but there is no direct statement to that effect, and the court discards the theory that the plaintiff was a guest and the defendant, an innkeeper.

It is difficult, from the facts, to arrive at the conclusion that the plaintiff was a mere boarder. It is fairly well recognized that the relation between the owner of an apartment house and its occupants is that of landlord and tenant. (Humes v. Gardner, 22 Misc. 333; Barlinger v. Hamelburger, 149 A.D. 5; Gurland v. C.W. Realty Co., 223 N.Y. 716; Berras v. Kean, 231 N.Y. 566; Maslin v. Childs, 146 A.D. 174). The distinction was clearly pointed out in Mathews v. Livingston, (86 Conn. 268), where the question arose as to whether the plaintiff was a mere lodger or a tenant. It was stated that ordinarily the landlord furnishes the lodger with a furnished room or rooms, whose care the landlord has, and whose habitation and enjoyment he gives to the lodger. The tenant has the exclusive possession of his room, while the lodger has merely the use without the actual or exclusive possession which remains in the lessor. "But when it appears that the hirer of the rooms in a building devoted to a lodging house secures exclusive possession of certain rooms therein, over which the lodging house keeper retains no control, the law, in absence of contract or extraneous circumstances indicating a contrary intention will presume that it was the intention of the parties to create the relation of landlord and tenant, and not that of lodging house and keeper." In the present case, the plaintiff was furnishing her own furniture, and the circumstances indicate that she, like other tenants in the building, was to have exclusive control of her room. That certain portion of the defendant's building was leased to her, and she could treat it as her own property. In fact, the court said that the duty of bailee on the part of the landlord as to the goods clearly did not extend to her room,"they are not then in a place over which he has control". The circumstances present a situation where the room and its contents belonged to the plaintiff, and she could, if she so desired, exclude her landlord's agents from her apartment. Under the general fundamental rules, it would appear that the relation here was that of landlord and tenant.

A bailment is a contract by which the possession of personal property is temporarily transferred from the owner to another for the accomplishment of some special purpose. (Elliot on Bailments, 2nd, Sec. I). The essential fact of legal significance in all cases is possession. In actual bailment there must be a delivery of the chattel to the bailee or his agent. The delivery may be either actual or constructive. A constructive bailment arises where the person having possession of the chattel holds it under such circumstances that the law imposes on him the obligation of delivering it to another. (Wentworth v. Riggs, 159 A.D,899). In the present case, if any bailment does arise, it must be a constructive bailment, since there is no evidence of delivery to the defendant or its agents, either actual or constructive. The question then arises as to whether the defendant had such a possession of the trunk that it was under a duty to return it to the plaintiff.

If the plaintiff had, with the defendant's consent, placed the trunk in a storeroom located in the building, clearly the chattel would then be in possession of the defendant. (Samuel v. Princeton Const. Co.,157 N.Y.S. 135; Bryant v. Auchmuty, 129 N.Y.S.

47; Dalton v. Hamilton Hotel Op.Co., 242 N.Y. 48). But this was not done; on the contrary, the men employed to move her goods left it in the hall in front of her apartment. Is this sufficient to vest possession in the landlord?

Where the landlord leases a portion of the same premises to different persons, and reserves under his control certain parts to be used in common by all the tenants, he is under an obligation to keep the parts over which he so reserves control in repair; (Dollard v. Roberts, 130 N.Y. 269; Peters v. Kelly, 129 A.D.290; Walsh v. Frey, 116 A.D.527); and for failure to do so he is chargeable with liability for injuries suffered by the tenants without their fault while properly using them (Peil v. Reinhardt, 127 N.Y. 381). The reason for this rule is that, in leasing the separate portions of his building to his tenants, the landlord does not include the halls, stairs, entrances, or other parts which all the tenants have a right to use in common; no one tenant has the exclusive right to these parts of the premises, as is the situation with the specific portion he has leased; and the landlord is deemed to retain such parts and to see to it that they do not become unsafe. Consequently the law imposes a duty on the landlord to keep them in repair, and for failure to do so, he may be held responsible. He is liable for injuries sustained by the tenant as a result of defective stairways (Peil v. Reinhardt, supra; Mudd v. Gray, 200 Ala. 92) or halls (Hicks v. Smith, 158 A.D.299; Horn v. Danziger, 110 Misc. 341). But it is to be observed that this liability is based upon the landlord's duty to repair; when he has breached that duty, and because of such breach, property or personal injuries result, then he is responsible. Furthermore, actual or constructive notice of the defect is necessary in order to charge the landlord with the liability. (Dollard v. Roberts, 130 N.Y. 269; Hirsch v. Radt, 228 N.Y. 100). Nor is he required to police the hallways of the premises to prevent obstructions by tenants or other persons, or to prevent negligent or malicious persons not in his control from putting the premises in an unsafe condition. (Greenberg v. Man, 119 N.Y.S. 244). He will not be liable to such a one who uses the premises in a manner outside of the purpose contemplated at the time of letting. (Murtha v. Ridley, 196 A.D.61; rev. 232 N.Y. 488 on the ground it was error not to submit to the jury the question whether the premises were being used properly).

To base a liability of the landlord for the loss of property placed in the hall, which is in no way caused by a defective condition of the hall, on this rule of law would be an utter disregard for the reason behind, and the qualifications upon, the rule. Likewise the placing of goods in the hall should not thrust upon the landlord possession of the goods, irrespective of the attending circumstances - unless, of course, there was some agreement to the contrary. The hall was not used for the storage of trunks at any time. The defendant was not notified that the plaintiff was about to use it as such. No agent or servant of the defendant consented to such use. The trunk was not lost because of a defective condition of the hall. The landlord has "control" of this part of his building only in so far as there is an obligation

on his part to keep it in repair. Under these circumstances it is indeed difficult to understand how it could be said that the landlord was in possession of the trunk, and, still further, that he was liable for its loss.

But, assuming that he was in constructive possession of the chattel, are the other necessary elements of a bailment present so that the defendant can be held liable on the theory of bailee? The possession in the bailee must be such as to exclude the possession of the owner and all persons, and to give to the bailee for the time being the sole control thereof. (Bertig v. Norman, 101 Ark. 75; Broaddus v. Commercial Nat. Bank, 42 A.L.R. 1331; Fletcher v. Ingram, 46 Wis. 202; Wentworth v. Riggs, supra). In Wentworth v. Riggs the court held that an owner of a restaurant was not the bailee of an overcoat which was hung upon a hook placed in the restaurant for the convenience of the patrons. It was said, "The plaintiff did not intend to transfer to the defendant, or his servants, such possession of the coat as would exclude for the time of the bailment the possession of the owner" who could have removed the coat, or articles from its pockets, at any time without the consent of the proprietor or his servants. This statement and holding is directly in point with the present case.

In addition to this element of exclusive possession, the party sought to be charged as bailee must accept the property, because the relation is founded on contract, and the duty and liability springing therefrom cannot be thrust upon one without his knowledge, or consent. (Bertig v. Norman, supra; Pattison v. Hammerstein, 17 Misc. 375; Feder v. Franklin Simon Co.,157 N.Y.S. 895). It is fundamental that one cannot become, or be made, the bailee of another's property without his consent. (Goddard, on Bailments, sec.5; Coons v. First Nat. Bank, 218 A.D.283; First Nat. Bank v. Ocean Nat. Bank, 60 N.Y. 278). This principle is well stated in Krnusky v. Loeser, (37 Misc.505); "Where one becomes possessed of another's goods by chance or accident, no bailment obligation will arise unless the possessor is aware and has knowledge of the fact that the goods have come into his possession which belong to another". And since the duties and responsibilities of a bailee cannot be thrust upon a person without his knowledge, or against his consent, it is essential to the bailment that there be an acceptance of the subject matter. (Van Wagoner v. Buckley, 148 A.D. 808; Barnes v. Stern Brothers, 89 Misc. 385). Acceptance may be proved either directly or circumstantially, but in either event the proof must show that the person to be held knows that he is bailee of the property, or has notice thereof, before he can be charged with the duties and responsibilities arising out of this relation. (Bertig v.Norman, supra). In Cowen v. Pressprich, (200 A.D.796), a bond was, by mistake delivered to the defendants who, in good faith attempted to return it, but gave it to a wrong messenger boy and it was lost. The court, holding that they were not liable as bailees, said that it is only where "involuntary bailees" commit some overt act of interference with the property that an implied contract of bailment is created;(i.e., in such a manner would acceptance be shown);

that an implied contract of bailment with its consequent obligations arises only where a person in possession of the property of another does some act which is inconsistent with the view that he does not accept the possession which has been thrust upon him.

In all the cases where the defendant has been held responsible on the theory of constructive bailment, there has been a transfer of possession to him, with his knowledge, and acceptance thereof. In Bunnell v. Stern, (122 N.Y. 539), the plaintiff entered the defendant's store for the purpose of trying on coats. She placed her own coat on the counter directly in front of the clerk who was waiting on her, and another clerk was standing near her watching the garments. The coat was lost, and the defendant was held liable as bailee. The court refused to carry this rule any further, however, when it held the defendant was not liable as bailee in Wanner v. Browning,King & Co., (187 N.Y. 87). In that case the plaintiff entered the defendants store to purchase a suit. The clerk was busy at the time, and told him to wait on himself, designating a certain table. Plaintiff proceeded to try on coast, laying aside his own coat and vest containing a watch and other valuables. The vest and contents were stolen. The court distinguished it from the Bunnell case in that the clerk was not present to attend personally to the plaintiff. And the court has refused to hold the store responsible for articles of value contained in the garments which are laid aside, although a clerk is attending the plaintiff at the time. (Barnes v. Stern Brothers, 89 Misc.385; Feder v. Franklin Simon & Co., 157 N.Y.S. 895).

Thus it would appear that, on the point of bailment, alone, the Supreme Court of Alabama overlooked some of the essential elements which constitute that relationship. There is no evidence whatever that the defendant had knowledge that the trunk was even in its hall, much less that it was in its possession; and certainly it cannot be said that it accepted possession of the trunk. In effect the court has held that a chattel may be thrust upon a person without his knowledte or consent, and he will be held liable therefor. It is, indeed, practically impossible to reconcile the decision with existing legal principles.

Burke W. Drummond

* * *

SEALS - INTENT - NECESSITY OF ADOPTION IN BODY OF INSTRUMENT

Although all positive law is dependent upon historical conditions, and an alaysis of the development of a thing may show how it came to be, it often does not show that presently it ought to be. The use of seals nowadays is warranted by prescription and usage, not by any intrinsic worth of the seals themselves. The need that brough seals into general use has long passed, but our courts, while confessing their use to be an anachronism, are reluctant to disregard them. With this adherence to custom, the immemorial practice of sealing is recognized, and the talismanic charm of the seal still persists.

That the mere presence of a seal will convert an ordinary promissory note into a specialty was recently held by the Appellate Division, first department, in the case of O'Keefe v. French, (239 A.D. 498). The question raised on appeal was whether the plaintiff's action, brought on three promissory notes was barred by the Statute of Limitations. The answer to the question depended upon the determination of the character of the instruments; whether they were sealed or unsealed. The notes had been executed in Florida on printed forms, and the word "seal" was printed opposite the space for the maker's signature. No mention of sealing was made in the notes. The opinion stated that since section 44 of the General Construction Law declared that the word "seal" is the equivalent of a private seal, the appearance of that word after the signature on the notes in suit was sufficient to constitute each note a specialty, and that, therefore, the twenty-year Statute of Limitations applied. It was conceded that in Florida the presence alone of the word "seal" upon a note made it a sealed instrument. (Langley v. Owens, 52 Fla. 302,42 So.457). But the court, assuming that the lex fori prevailed instead of the law of the state where the contract was made, and there is some basis for their assumption in this respect (Warren v. Lynch, 5 John.239; Andrews v. Herriot, 4 Cow. 508), pronounced the notes in controversy specialties even under the laws of the State of New York.

This holding brings up the much mooted question of whether the presence of a seal on an instrument is sufficient to constitute that instrument a specialty, in the absence of any recital or recognition of the sealing in the body or attestation of the instrument. The text books in general are of the opinion that a recital, as such, is not essential to the validity of a sealed instrument. (Williston, Contracts, §209; Restatement of the Law of Contracts, §100). This, however, is at variance with the trend of the decisions of this state. The apparent conflicts and contradictions found not only between the New York cases and those of other states, but also among the New York cases themselves is caused by differences of judicial conception of what constitutes a seal.

The substance of seals offers an interesting historical and philological study, but it is not relevant, in the light of modern developments to the problem at hand. (For brief history of seals see: (Seals, Am.Law Rev. 1 - 638). At common law a seal consisted of a piece of wax, a wafer, or other tenacious substance bearing an impression, and affixed or attached to the instrument to be sealed. (Cyc. Law Dict.). To put it more quaintly, sigillum est cera impressa quia sine impressione non est sigillum. At comlaw an instrument necessarily showed upon simple inspection whether or not it was sealed. It was an appeal to the senses. When such seals proved themselves there was no need for a recognition of sealing in the instrument, and none was required at common law. (Goddard's Case, 2 Coke 5; Burton v. LeRoy, 5 Sawy. 510). New York State for a long time countenanced no substitute for the common law seal, the policy of this stand being, as set forth by Kent Ch. in Warren v. Lynch, (5 John.239), "of giving ceremony and solemnity to the execution of important instruments, by means of which the attention of the parties is more certainly and effectually fixed, and fraud less likely to be practiced on the unwary." (Coint v. Milliken, 1 Denio 376; Bank of Rochester v Gray, 2 Hill 493).

While New York State still clung to the ritual of the common law seal, other states by statute and decision recognized the scrawl or scroll as a substitute for the wax or wafer. The innovation of these makeshifts was due to a realization that it is the sealing which authenticates, and not the substance receiving the impression. (Jacksonville R.R. v. Hooper, 160 U.S. 514; Pillow v. Roberts, 13 How. 472). In other words the courts should regard as a seal that which was intended to serve as a seal. Sealing became constructive rather than actual. In Hacker's Appeal (121 Pa.St.192) it was held that a single horizontal dash, less than an eighth of an inch long, was a sufficient seal, which certainly is a far cry from the solemn and formal common law sealing. In this state the legislature has undertaken to define by statute what shall constitute a seal.

> Seal, Private. The private seal of a person, other than a corporation, to any instrument or writing shall consist of a wafer, wax or other similar adhesive substance affixed thereto, or of paper or other similar substance affixed thereto, by mucilage or other adhesive substance, or of the word "seal", or the letters "L.S." opposite the signature. (General Construction Law, section 44, Laws 1892).

With the lessening of the consecrating influence of seals, and with the advent of their modern substitutes, there appeared in foreign decisions the idea that the intent to seal should be evidenced by some recital in the instrument, as a safeguard against fraud. (Burton v. LeRoy, 5 Sawy 510). This rule was obviously a corollary of the old common law rule that seals required no recognition in the body of the documentbecause they were self proving. But, whatever its source, the reason for holding a recital of sealing requisite to specialties finds its

basis in the prevention of fraud; "for otherwise a suppositious seal might be affixed, and a mere parol promise or agreement be exalted into a specialty." (Austin v. Whitlock, 1 Munf.(Va.)487). The theory was forcibly expressed in Virginia, and in the case of Bradley v. Salt Co. v. Norfolk Co.,(95 Va.461) it was also asserted that since the fact of sealing was a part of the contract itself, there was every motive for requiring that the recognition of it should be found in the writing which manifested all the other terms and stipulations between the parties. Similar reasons for requiring a recital of sealing are to be found in New York cases. (Merritt v. Cornell, 1 E.D.Smith 335; Matter of Pirie, 198 N.Y.209).

Without passing upon the soundness of the reasons behind the requirment of a recital of sealing in a sealed instrument, it is here material to ascertain the degree to which this requirement has been adopted and the extent to which it has been applied by the courts of this state. The case most frequently cited on this point is Matter of Pirie (198 N.Y. 209). In this case, which involved a question of the Statute of Limitations as applicable to a promissory note purporting to be under seal, Judge HAIGHT, writing for the Court of Appeals, stated, "There is nothing in the body of the note or of the signing of it which indicates that it was intended to be a sealed instrument. Ordinarily a seal affixed to a paper in the form of a promissory note changes it into a sealed instrument, which, under the Statute of Limitations, may run for twenty years; but the mere attaching of a seal after the signature does not raise a presumption that the note is a sealed instrument, unless there be a recognition of the seal in the body of the instrument, by some such phrase as 'witness my hand and seal' or 'signed and sealed'." This holding is supported by the earlier case of Weeks v. Esler (143 N.Y.374) which was an action brought against the endorser of two promissory notes made by a corporation and purporting to be under a corporate seal. The seal was imprinted on the notes by means of a rubber stamp, there being no mention of the fact of sealing in the instrument. The court held, in short, that the mere presence of the seal unaccompanied by any recital that the seal of the corporation was affixed or a single fact evidencing that the company's officers intended to seal was quite insufficient to effect the apparent character of the notes. Following Weeks v. Esler, supra, and confirming the rule laid down are the cases of New York Security & Trust Co. v. Manhatten Athletic Club, (81 Hun 33), and Chase Nat. Bank, (72 Hun 373). Likewise in Brooklyn Public Library v. City New York, (222 A.D.422) it was declared that to constitute a sealed instrument there must be a seal and some recognition of it in the instrument, or some evidence of it aliunde. In the case of Drexler-Rochester Properties Inc. v. Paris, (236 A.D. 409) the principles of the above cited cases were iterated. It was there held that a seal does not raise a presumption that the document is a sealed instrument unless there be a recognition of it in the body of the instrument, and that the rule is in substance the same in cases of corporate seals. Hence, in the absence of any recital of sealing, and of any evidence of sealing or that the corporate seal was impressed, a presumption arises that the instrument was not uttered as a sealed obligation. There is also dictum in Empire Trust Co.

v. Heinz (242 N.Y. 475) that a seal annexed to an ordinary obligation does not necessarily make it a sealed instrument.

However, notice should be taken of two cases in this state that apparently hold to the contrary. The earliest was Merritt v. Cornell (1 E.D.Smith 335) which was an action in debt on a promissory note bearing a common law seal, without recognition of sealing in the body of the instrument. The plaintiff proved the signature, and the defendant moved for a non-suit on the ground that there was no proof of the sealing. But the defendent offered no evidence to disprove the sealing and the court denied the motion. Yet in so doing the court remarked that in cases where a scrawl or scroll was used there must be some evidence that it was intended to be used as a seal. Merritt v. Cornell, supra, was cited in the second case, Anthony v. Harrison (14 Hun 198), by the referee "as part of the learning upon the question rather than as an authority to be relied upon." In this latter case the referee decided that the instrument in controversy were specialties, although they did not on their faces purport to be sealed, for the rather palpable reason that the fact of sealing had been proved. In this case, also, there was some dictum to the effect that in the absence of express intent to seal an instrument the sealing should be proved. Ironically enough the referee's report has suffered the same fate it imposed upon Merritt v. Cornell, supra; it remains as part of the learning and not as an authority. Neither case has been followed.

It appears from the foregoing cases that the mere appearance of a seal upon a document wanting any reference to the seal does not raise a presumption that it is a sealed instrument. In Smith v. Henning (10 W.Va.596) it was said that to constitute a sealed instrument there must be a seal affixed and some recognition of it in the instrument or some evidence of it aliunde, but that it could never be maintained that such evidence, whether by proof of witnesses or acknowledgement of the party, would not supply the place of such recognition. This West Virginia case has been cited in Matter of Pirie (198 N.Y. 209); Brooklyn Public Library v. City of New York, (222 A.D. 422); Zeis v. Wurston, (139 Misc.538); and these cases indicate that in New York State proof of sealing dehors the instrument may be made. The efficacy of sealed instruments lies in their form, and while at common law if the form was complete evidence of intention was disregarded, (Lacey v. Hutchinson, (5 Ga. App. 865, 64 S.E. 105) yet with the present day tendency to subordinate observance of form to ascertainment of intention, the question of sealing has been resolved in a great degree into a matter of intention. It is rightly thus. Hence the appearance of a seal unsupported by any reference in the instrument has no presumption in its favor, and the party contending that it is a specialty must prove that it was executed as such. (Drexler-Rochester Properties v. Paris, 236 A.D. 409). In such a situation the character becomes a question of fact. On the other hand it is to be noted that a seal as defined by section 44 of the General Construction Law is essential to the validity of a specialty. Intent to seal, express or implied, will not create a specialty when no seal or its legal equivalent is affixed on the instrument.

(Empire Trust Co. v. Heinze, 242 N.Y. 475; Davis v. Bingham, 39 Misc. 299). A sealed instrument, the, is a writing to which is affixed or on which is impressed some symbol or device recognized by law as a seal, provided however that there appear either by recital in the writing or by extrinsic proof an intention of the executant to make it a specialty.

An application of these principles to the situation in O'Keefe v. French, supra, would lead to a different conclusion than the court reached in that instance. The court summarily held that since the word "seal" was a valid seal by statute its use on the instrument created a specialty. According to the decisions this is not sufficient; there is not even a presumption of sealing. The General Construction Law defines seals, not sealed instruments, and seals alone do not make sealed instruments in this State. However, in the questioned case the word "seal" was printed on the blank form of the note, and on this basis Matter of Pirie, supra, was distinguished, for in that case the seal was affixed at the time of execution. Is this a real distinction? There was no New York case in point to be found, and the foreign cases are conflicting. In Colorado it was held that the printed word "seal" upon a note, in the absence of any recital, was not sufficient. (Buckingham v. Orr, 6 Col. 587). In Massachusetts it was likewise held insufficient, as being in derogation of the very theory of sealing in that it left nothing to be done by the signer. Other states have held to the contrary. (People v. Ford, 294 Ill. 319; Langley v. Owens, 52 Fla. 302; Osborn v. Kistler, 35 Ohio 99; Evans v. Nissley, 156 Pa. 329). In the last cited case the argument was that if the printed word "seal" had been written by the defendant there would have been no doubt about its efficacy, and therefore it made no difference if it was printed beforehand because ratification was equivalent to antecedent authority, and the writing of the signature opposite it was ample evidence that he adopted the act of the printer in putting it there for a seal. The logic and the practicability of this argument is convincing, but it is inapplicable to the law of this state as expounded in the decisions. A recital is not necessary in Pennsylvania. (Taylor v. Glaser, 2 Serg.& Rawles 502; Lorah v. Nissley, supra). It is well established in this state that the promisor or obligor can adopt a seal already impressed upon an instrument. (Worral v. Munn, 5 N.Y. 229; Alstyne v. VanSlyck, 10 Barb. 382; Atlantic Dock Co. v. Leavitt, 54 N.Y. 29; Farmer's Loan & Trust v. Siefke, 144 N.Y. 354; Rushing v. Union Pipe Co., 5 A.D. 448, affd. 158 N.Y.727; Cammack v. Slattery, 241 N.Y. 39; Brooklyn Public Library v. City of New York, 222 A.D. 422). But the matter of adoption is governed by the same rules as govern actual sealing. Where it is found that the contract recites that it is under the hands and seals of the parties, if only one seal is affixed after the names of the parties, that will be sufficient proof that the particular seal was adopted by all who signed under the recital, and the seal will be deemed to be the seal of all the parties. (Rushing v. Union Pipe Co., supra). Thus where the sealing or the adoption of the seal is denied it rests upon the party averring the sealing to prove it by a preponderance of evidence. (Farmer's Loan & Trust Co. v. Siefke, supra). If, however, there is a recital of sealing

in the instrument the maker may be estopped from denying it. (Metropolitan Life Ins. Co. v. Bender, 124 N.Y. 47). It would seem therefore, that there is no real distinction between a seal previously printed on the writing and a seal made at or after the execution of the instrument. In either instance, in the absence of a recital of sealing there can be no presumption that there is a sealed instrument; if sealing is not asserted it must be shown that the seal was made with an intention to create a sealed instrument, or that a seal on a sealed instrument was adopted with like intent.

Much has been said in ridicule of sealing, and often it may seem to be obsequious homage to antiquated technicality, yet it has such importance in our law as cannot be ignored. (C.P.A.§47, 342). A seal can determine whether the vitality of an instrument shall endure for six or twenty years. It is then of prime consequence. New York State in maintaining that a seal alone is insufficient without supporting evidence of intention to seal manifests the commendable trend of subordinating form to intent. This New York rule is against the weight of authority in this country, (Restatement of the Law of Contracts, §100), Virginia, Alabama, Georgia also belong to the minority in this respect. In the neighboring state of Massachusetts the matter has been very simply settled by statute, (Acts of 1929, Chp.377), which provides that any instrument declaring itself to be sealed will be regarded as such without further ado. This certainly is a great advance from the ancient custom of personal authentication:

> And to witness that this is sooth,
> I bite the wax with my wang tooth.

Thomas E. Johnson

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CONSTITUTIONAL LAW - IMPAIRMENT OF OBLIGATION OF CONTRACT - MINNESOTA MORTGAGES

During every period of serious financial depression in this country, legislation for debtor relief has come to the fore, and with the same degree of regularity these laws have been overthrown as unconstitutional. (Sturges v. Crowninshield, 4 Wheat. 122(1819); Bronson v. Kinzie, 1 How. 311, (1843); Howard v. Bugbee, 24 How. 461, (1860); Edwards v. Kearzey, 96 U.S. 595, (1877); Barnitz v. Beverly, 163 U.S. 118, (1896)). In January of this year, however, the Supreme Court of the United States upheld the constitutionality of a Minnesota statute which provided for an extension of the period of redemption from foreclosure sales.

The proposition arises in Home Building & Loan Ass'n. v. Blaisdell, (__ U.S.__, 78 L.Ed. 255). The State of Minnesota passed a statute authorizing the courts to grant a two-year extension of the time in which redemption might be made from mortgage foreclosure sales, but required as a condition precedent to the procurement of this additional period, that the mortgagor be ordered to pay the income or the reasonable rental value of the property toward the discharge of taxes, insurance, interest and mortgage indebtedness. The duration of the law was limited to two years and it was to expire before that time if the emergency ceased. (Chap.339, Laws of Minnesota, 1933).

The State court upheld the statute as an emergency measure. It conceded that the obligations of the mortgage contract were impaired, but held that it was within the police power of the State as that power was called into exercise by the public economic emergency which the legislature had found to exist. Justice Olsen said: "The present world wide business and financial crisis has the same result as if it were caused by flood, earthquake, or disturbance in nature ***." (Blaisdell v. Home Building & Loan Ass'n., __Minn.__,249 N.W. 334).

The Supreme Court of the United States does not concede this point but argues that the contract clause of the Federal Constitution is qualified and that Laws altering existing contracts constitute an impairment only if they are unreasonable in the light of the circumstances occasioning their enactment.

Chief Justice Hughes speaking for the Court says that in determining whether a provision for temporary and conditional relief exceeds the power of the State by reason of the clause in the Federal Constitution prohibiting impairment of contracts the relation of emergency to constitutional power, the history of the setting of the contract clause and the development of the jurisprudence of the Supreme Court in the construction of the clause must be considered. "While emergency does not create power, emergency may furnish the occasion for the exercise of power." The Court took judicial notice of the existing emergency in Minnesota as found by the legislature and Supreme Court of that State. Having found that an emergency existed it easily found that the legislation

was addressed to a legitimate end, that it was not for the benefit of a particular group of individuals but for the protection of basic interests of society, and that the conditions upon which the period of redemption was extended were reasonable and that the integrity of the mortgage indebtedness was not impaired, but that there was merely an extension of the time to redeem.

In spite of what the Court says about the integrity of the mortgage indebtedness not being impaired, it seems to be quite evident that the contract obligation was impaired and that it was not merely the remedy that was changed. By the extension period the person who was entitled to possession is kept out of possession, and the mere payment of rent during that period is not equivalent to giving him the possession that he would otherwise be entitled to. In, brief then, the prevailing opinion really holds that the legislation does not contravene the Federal Constitution because the statute extending the period of redemption was encated in the justifiable exercise by the State Legislature of its inherent police power, legitimately applied to an emergency, the existence of which the Court took judicial notice.

The dissenting opinion, naturally holds that it is not within the police power of a state to enact legislation impairing the obligations of contracts and oddly enough the same cases are cited andrelied upon by both opinions. The argument is that the Constitution was framed in just such troublesome times of financial and economic distress as we are now experiencing and the same arguments were being put forth to relieve debtors as have been suggested at the present time and it was with this in mind that the framers of the Constitution wrote into it the clause prohibiting any state from impairing the obligations of contracts. If when the instrument was made the clause meant that terms of a contract for payment of money could not be altered by a state statute for the relief of hard pressed creditors, it obviously means the same now. The same provision does not admit of two distinctly opposite views. In Ex parte Milligan, (4 Wall. 2), the Court in just such perilous times said: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all time, and under all circumstances. No doctrine, involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism ***." The dissenting opinion goes on to say that "The defense of the Minnesota law is made upon grounds which were discountenanced by the makers of the Constitution and have many times been rejected by this court. That defense should not now succeed because it constitutes an effort to overthrow the constitutional provision by an appeal to facts and circumstances identical with those which brought it into existence. With due regard for logical thinking, it legitimately cannot be urged that conditions which produced the rule may now be invoked to destroy it." It says further: "The Minnesota statute either impairs the obligations of contracts or it does not. If it does not, the occasion to which it relates becomes immaterial, since then the passage of the statute is the exercise of a normal, unrestricted, state power and requires no

special occasion to render it effective. If it does, the emergency no more furnishes a proper occasion for its exercise than if the emergency were non-esistent." The opinion then finds no difficulty in finding that the provision does impair the obligations of contracts and so is unconstitutional.

There the two opinions stand - the one holding that the state has within the police power the authority to declare an emergency, and, having declared it to exist, to legislate to meet the emergency even though Constitutional limitations are over-ridden; and the other view that no matter what emergency arises there is no power to legislate to meet the occasion if such legislation enlarges the limitations of a constitutional provision.

An examination of the similar cases on extensions of the redemption period of mortgages avails little in the way of upholding the Minnesota statute. The court does distinguish the instant case from the others that were held to be unconstitutional on the theory that in the other cases the extension of the period of redemption was unconditional, and there was no provision, as in the Blaisdell case, to secure to the mortgagee the rental value of the property during the extended period. This added provision seems to be a rather small point upon which to hang so weighty a decision. The contract obligation seems to be altered in one as much as in the other, the difference being in degree only. The mere added feature that the mortgagee is assured of a reasonable rental during the extended period does not remove the taint of the impairment of the contract, as that is not what the mortgagee bargained for.

It would seem that the only good and sufficient reason upon which to base the holding in the Blaisdell case is that it is a valid exercise of the state police power. The police power is a general and vague power without, it appears, any definite limits, One of the most complete definitions of this power is given in Cooley's Constitutional Limitations. Quoting Chief Justice Shaw, "We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this Commonwealth is held subject to those general regulations which are necessary to the common good and general welfare.*** This is very different from the right of eminent domain **. The power we allude to is rather the police power; the power vested in the legislature by the constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and sources of this power than to mark it's boundaries, or prescribe limits to its exercise." And also this other definition: "We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as

regulations designed to promote the public health, the public morals or the public safety." Another definition of the police power from the same source might well take in the instant case. "The dimensions of the government's police power are identical with the dimensions of the government's duty to protect and promote the public welfare. The measure of police power must square with the measure of public necessity. The public need is the polestar of the enactment, interpretation, and application of the law.*** Moreover the growth of the police power must from time to time conform to the growth of our social, industrial, and commercial life. You cannot put a straight-jacket on justice any more than you can put a straight-jacket on business."

All of these comments on or definitions of the police power are made with the presumption that the legislation exercising the power shall not be repugnant to an express provision of the Constitution. The court in applying the police power to sustaining this legislation goes on the assumption that all contracts are made subject to an implied reservation of the protective power of the state, and that therefore statutes which validly exercise this reserved power, rather than impairing the obligation of an existing contract, are comprehended within them. This presupposes that the contract clause is susceptible of a flexible construction. This presumption is not without support in other decisions. (Sturges v. Crowninshield, 4 Wheat. 122).

The court in deciding the case undr consideration relied upon the Rent cases for sustaining the validity of the emergency doctrine. In the Rent cases legislation suspending landlord's actions to recover possession of leased premises during a serious housing shortage was upheld as reasonably necessary to deal with what was deemed an emergency situation. (Marcus Brown Holding Co., Inc. v. Feldman, 256 U.S. 170) There seems to be an apparent distinction between the Rent cases and the instant case in that the housing problem in congested areas is much more of a public affair and affects the general welfare more directly than the mortgage moratorium cases.

As a matter of mere logic the dissenting opinion has the best of the case. As has already been pointed out the contract clause was inserted in the Constitution for the very purpose of preventing emergency stay laws. Unless the Constitution is a document that is so adjustable to changing events that its application in modern times may bring about an absolute reversal of the meaning it originally had, the argument of the dissenting opinion cannot be answered. As a practical matter probably the prevailing opinion is a reasonable and noteworthy decision. The provisions in the Constitution were put in to preserve the Union and not to destroy it. If the emergency which the State of Minnesota is facing is so acute that the enforcement of the very letter of the Constitution is going to destroy a state of the Union it should not be enforced. With modern conditions it is quite possible that a state may be destroyed by economic crises equally as well as by actual invasion. In such a case it is probably as much the duty of the Supreme Court to preserve the economic welfare

of the state as it is to enforce provisions that were placed in the Constitution years ago when the welfare of the individual and the welfare of the state were not so closely entwined. As is said in the prevailing opinion, the case marks "a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare."

George Britten

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INJUNCTIONS - STRIKES - PICKETING

The oft-occurring disputes between labor and capital again have found their way from the factories to the courts. Capital has found an effective weapon in the use of the injunction, when it supremacy is threatened by a strike, boycott, or picket. The law relating to this subject is by no means uniform. The following analyeis will attempt to illustrate the two interpretations that have been given the right to picket.

New Jersey is one of the states that fails to recognize this right; and in the recent case of Elkind & Sons Inc. v. Retail Clerk's Int'l Protective Ass'n., (169 Atl.494), the court reiterated its position on the question. The plaintiff in that case conducts a retail shoe store in Newark. He seeks an injunction restraining the defendants from unlawfully interfering with his business. The plaintiff aleges that he conducts his business on the open shop plan and in compliance with the regulations of the National Recovery Act. On October 19, 1933, the defendant, Rosenberg, who is tne business agent of the defendant union, called upon the plaintiff and "demanded" that he and his employes sign an agreement with the defendant union, to become members of a local of said union, comply with its rules, and employ members of that orga nization and no others; and immediately to discharge such of their employes as were not members upon pain of strike of their employees, the creation of a boycott and picketing in front of his place of business with placards charging non-compliance with the National Recovery Act and unfairness to union labor. In other words, the defendants here sought to convert the plaintiff's open shop to a closed shop. The demands were refused and the defendant Rosenberg, then called upon the plaintiff's employees to walk out. Only one, out of nine, left the plaintiff's employ. Immediately the defendants began carrying out their threats by establishing a line of pickets in front of plaintiff's store with placards. At the time the defendants' activities were begun, there was no controversy between employer and employees and no known or expressed dissatisfaction on the part of the latter with the terms or conditions of their employment. The objects of the strike according to the affidavit of the defendant, Rosenberg, were "to endeavor to obtain recognition of the union voluntarily from the employer and also to obtain consent of the employers to hire only our members in connection with his business." Affidavits of two police officers showed that they kept the pickets from blocking the store entrance "and kept them moving at all times."

The court granted the injunction without any hesitation and flatly stated that picketing was unlawful. "The purpose of the so-called strike and the object of the defendants' demands was to compel the plaintiff to adopt the closed shop and employ only union labor. The strike agitators were mere volunteers and sought mainly to advance their own personal interests by demonstrating to their superiors their usefulness in inciting strikes and their ability to enforce their demands. The admitted 'demands' of the defendants for the closed shop were unlawful (Hitchman Coal &

Coke Co. v. Mitchell, 245 U.S. 229) and the 'demands' that plaintiff sign the proposed agreement on the dotted line is not only unlawful but audacious in the extreme. The strike called by the defendants being for an unlawful purpose, any act in furtherance thereof, including the picketing is militant in both character and purpose. Its purpose, compulsion of coercion, is accomplished only by intimidation."

The same tribunal and the same judge in J. Lichtman & Sons v. Leather Workers' Industrial Union (169 Atl. 498), evidenced a pro-N. R. A. spirit by another onslaught against picketing. "The inevitable disorder, intimidation, and violence incident to picketing in labor disputes, should now, more than ever before in the history of this country beguarded against if the herculean efforts of our chief executive toward economic recovery are to meet with any measure of success. ----Picketing in its mildest form is a nuisance which the Legislature is powerless to legalize."

New Jersey, however, is not alone in its holding. Michigan in Beck v. Railway Teamsters' Union (118 Mich. 497), Illinois in Barnes v. Chicago Typo Union (232 Ill. 402), California in Pierce v. Stablemens' Union Local (156 Cal. 70), Ohio in Ohio Steel Co.v. Local Union No. 218, of Cleveland, (110 Fed.Rep.698), Minnesota in Knudsen v. Beun (123 Fed.Rep. 626), Massachusetts in Vegelahn v. Guntner (167 Mass.92) and Iowa in Atchinson v. Gee (139 Fed. Rep. 582), all have held picketing to be unlawful.

The last mentioned state did so in very powerful if amusing language. "There is and can be no such thing as peaceful picketing any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching. When men want to converse or persuade they do not organize a picket line. When they only want to see who are at work, they go and see and then leave and disturb no one physically or mentally. The argument seems to be that anything short of physical violence is lawful. One man can be intimidated only when knocked down. But the peaceful law abiding man can be and is intimidated by gesticulations, by menaces, by being called harsh names and by being followed or compelled to pass by men known to be unfriendly. Perhaps such a man may not be a bully, but is frail in size and strength, or he may be a timid man; but such a man is just as much entitled to go and come in quiet without even mental disturbance as has the man afraid of no one and able with or without weapons to cope with all comers. The frail man, or the man who shuns disturbances, or the timid man, must be protected and the company has the right to employ such."

The reasons given for the above view are not manifold. The basic ones seem to be that picketing in itself is an act of intimidation and results in annoyance both to the employer and the employees, no matter what is said or done. It has been held that picketing tends by physical intimidation to deter others from seeking employment in the places vacated by the strikers and is designed to drive business away from the picketed place of business not by the lawful methods of persuasion but by the unlawful means of physical intimidation and fear. The highest court of Michigan in

Beck v. Railway Teamsters' Protective Union, supra, has held that picketing is an unwarrantable interference with free trade, and it makes no difference in effect whether the pickets are stationed a few feet or a thousand feet away from the premises picketed.

New York's position on this phase of the question is just the antithesis of the above. In Nann v. Raimist (255 N.Y.307) there occurred a dispute between two rival labor unions. The plaintiff was granted a broad injunction which restrained the defendant union from picketing the premises of the employer who employed just members of the plaintiff's union. Judge Cardozo, in writing the opinion for the court, said: "The injunction in this aspect is not to be sustained upon any theory that picketing per se is to be condemned as an illegal act. This court is committed to a contrary doctrine. The injunction is sustained upon the theory that the defendant having been permitted to picket subject to conditions, violated those conditions and in contempt of the existing mandate picketed with violence and with falsehood, spreading terror with a strong hand and a multitude of people."

The case of Stillwell Theatre Inc. v. Kaplan (259 N.Y. 405) presents a very liberal view upon this question. A controversy occurred here between Local 306 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operator's Union affiliated with the American Federation of Labor and a member of the State Federation of Labor and the Empire State Motion Picture Operator's Union which is not affiliated with those organizations nor with any other labor union or body. The plaintiff made a contract with the latter union whereby the plaintiff agreed to employ none other than members of that union as motion picture operators for a period of one year. The defendant picketed plaintiff's theaters with a sign which read: "Owners of this theatre refuse to employ members of Motion Picture Operators Union Local 306, affiliated with the American Federation of Labor." The picketing was peaceful, unaccompanied by any acts of violence, trespass or intimidation and the sign truly stated the fact. There was no question but that the defendant in picketing the theatres was actuated by a desire to improve labor conditions as to wages, hours, numbers of employees and conditions of work, although incidental disadvantages to the employer might result. The Appellate Division (235 A.D. 738) granted the plaintiff an injunction on the ground that the picketing was illegal because its purpose was to induce or cause a breach of the contract between the plaintiff and the rival union. "Such orderly picketing with truthful placards was wrongful, although the means employed were otherwise lawful, because such acts were indulged in to attain a wrongful and, therefore, an unlawful purpose to wit, the breach of contracts of employment for fixed and definite periods of time."

The Court of Appeals, with Judge O'Brien dissenting, reversed the Appellate Division. Chief Judge Pound, in writing the majority opinion, stated: "The Court of Appeals has for many years been disposed to leave the parties to peaceful labor disputes

unmolested, when economic rather than legal questions were involved. The employer, if threatened in his business life by the violence of the unions or by other wrongful acts, might have the aid of the court to preserve himself from damage threatened by recourse to unlawful means, but the right of workmen to organize to better their condition has been fully recognized.The fact that such action may result in incidental injury to the employer does not in itself constitute a justification for issuing an injunction against such acts. The interests of capital and labor are at times inimical and courts may not decide controversies between the parties so long as neither resorts to violence, deceit, or misrepresentation to bring out the desired results.

"We would be departing from established precedents if we upheld this injunction. We would thereby give to one labor union an advantage over another by prohibiting the use of peaceful and honest persuasion in matters of economic and social rivalry. This might strike a death blow to legitimate labor activities. It is not within the province of the court to restrain conduct which is within the allowable area of economic conflict."

By only a superficial comparison between this case and the Elkind case, supra, it can be seen that our courts are much more liberal to labor than the tribunals of New Jersey. Without a question, the defendant rival union in the Stillwell case, would have been labelled as an "intermeddler", had it conducted similar activities in New Jersey. Despite the fact that an injunction was denied in the New York case, it seems that the plaintiff would have an action at law against the defendant for the latter's tortious conduct which tended to breach an existing contract. The plaintiff, however in order to recover, would have to show the breaking of the contract plus consequential damage.

Picketing may be viewed in another light. The law has sought to punish those guilty of unlawful picketing by charging them either with disorderly conduct or conduct which tends to create a breach of the peace. In Peo. v. Friedman (130 Misc. 525) 123 defendants were charged with disorderly conduct tending to provoke a breach of the peace in violation of Section 1459 of the Consolodation Act (Laws of 1882, Chap. 410). It appears that the defendants gathered on West 29th Street in New York City for the purpose of picketing and in that way further the interests of a party to a strike in the fur industry. The defendants marched up and down the sidewalks four abreast, thus inconviencing many pedestrians. The Court of Special Sessions convicted the defendants on the ground that their conduct constituted disorderly conduct tending to a breach of the peace. The Court of Appeals in People v. Nixon (248 N.Y. 182) reversed the conviction and ordered the discharge of the defendants. Judge Lehman, in writing for the court said: "There is no suggestion in the record that the defendants' march up and down the street was not quiet and orderly. They were guilty, we may as well concede, of atrociously bad manners, and they discommoded some other persons lawfully using the street,

to the extent that a few pedestrains were caused to enter the roadway. There is no evidence that the persons discommoded showed any particular annoyance. Perhaps bad manners are too usual to evoke unusual irritation or annoyance. As yet, bad manners have not been made punishable by imprisonment. The question is whether the defendants' conduct went beyond mere bad manners and tended towards a breach of peace."

It is at this point weel to compare the different phraseology applied to picketing. New York infers that peaceful picketing is at the most, the exercise of bad manners, while New Jersey says it is a "nuisance" in its mildest form, which the legislature is powerless to legalize. Both positions are supported by meritorious argument.

Picketing in order to be lawful must be unaccompanied by any form of intimidation whatever. In this connection the problem, whether a mere large number of pickets will be sanctioned arises. In other words, does a large crowd of workers, in front of a place of employment, tend to incite fear either in would-be employees or prospective customers? The better opinion seems to be that such form of picketing is unlawful, although in Segenfeld v. Friedman (193 Supp. 128) it was stated by way of dicta that "Right or wrong is not determined by mere numerical considerations." The other side to this proposition was analyzed in Michels v. Hillman, (112 Misc. 395) wherein the court said: "Whatever number of pickets was necessary to secure the reasonable and lawful purpose of the union is sanctioned by law, but where the number is swelled to 500 or 600 made up in part of workers from other factories, the unnecessary and unlawful purpose to awe and intimidate by numbers is apparent. Intimidation may consist in numbers alone without any actual violence."

There is another instance wherein picketing, which is apparently peaceful, will be enjoined. Such a situation is presented by the case of Yablonowitz v. Korn (205 A.D. 410). The plaintiff ran a little meat market in New York City and employed two union men who subsequently went out on strike. He then conducted his business with the aid of his wife and sone alone. An injunction was granted restraining the defendant union from picketing the plaintiff's store. The most important factor in the determination of this case seems to be the fact that the picketing was instituted not for the purpose of assisting the employees, but simply for the purpose of coercing the plaintiff to hire union men. Had the plaintiff employed non-union men subsequent to the strike of his former employees, there is no question but that the court would have denied an injunction, providing the picketing was properly conducted.

It seems rather difficult to define what constitutes peaceful picketing after reviewing the cases on this question. The court in Exchange Bakery and Restaurant Inc. v. Rifkin (245 N.Y. 260) attempted this in a sort of negative way by enumerating certain acts that might make picketing illegal. "Picketing con-

notes no evil. It may not be accompanied, however by violence, trespass, threats or intimidation express or implied. No crowds may be collected on or near the employer's property. The free entrance of strangers, customers, or employees may not be impeded. There may be no threats, no statements oral or written, false in fact, yet tending to injure the employer's business." An example of unlawful picketing is found in the recent case, J.H. & S.Theatres v. Fay, (260 N.Y. 315). The defendant union herein did more than lawfully picket the plaintiff's premises. Four convassers were employed by it to distribute copies of the Labor World and to interview residents of the neighborhood in order to persuade them not to patronize the plaintiff's theatres. The court repeated the doctrines of the Stillwell case, supra, and held that as long as the agents of the defendant confined themselves to honest and truthful persuasion, the plaintiff had no right to complain. But the evidence showed that the convassers misrepresented the situation and attempted by intimidation of prospective customers to destroy the plaintiff's business. This they certainly had no right to do and the court so held.

In the federal jurisdiction the right to strike and the right to picket have been established by statute - The Clayton Act of October 15, 1914. It is there provided that no injunction order "shall prohibit any person or persons, whether singly or in concert from ceasing to perform any work or labor, or from recommending, advisiong or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully by for that purpose - - of peaceably persuading any person to work or to abstain from working; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

Thus we find the right to picket definitely sanctioned and rooted in the statute laws of the Federal government. This enactment does not, of course, control the courts of the State of New York, but it does put into federal statutory form the law of this State as propounded by its ablest jurists. (Wood Mowing and Reaping Co. v. Toohey, 114 Misc. 185).

What reasons can be assigned for the different viewpoints on this question? At first glance it would seem that the right to picket is recognized in those states where labor is most strongly organized and denied in those states where labor's strength is weak. But this reasoning must fall when we see the right to picket disregarded in such highly industrialized states as Michigan, Illinois, Ohio, Massachusetts. The only apparent basis for the diversity of opinion, is the personnel of the courts. This reasoning seems to be strengthened by the current trend - that is, the five to four line-up in the United States Supreme Court - the liberal five versus the conservative four.

The New York view appears to be adopted by the majority of the States. If workers can organize for the legitimate purposes of improving their conditions, either by obtaining an advance in the rate of wages or by lessening the hours of employment then it should follow that in attaining these ends they should have the

right to use any means whatever, provided such means are not employed to coerce, intimidate or inflict injury upon employer, employee, or customer. Picketing can be conducted in such a manner as to avoid such undesired and unnecessary conflict. Men have the absolute right to unite to achieve that which cannot be achieved individually. (Curran v. Galen, 152 N.Y. 33). The right to picket seems or should be the compliment to the right to strike.

Bernard Simon

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MALICIOUS PROSECUTION IN RELATION TO IMMIGRATION PROCEEDINGS

A recent case of Mohammed Al Raschid v. News Syndicate Co.Inc., (239 A.D. 289) presents an interesting question arising under the law of malicious prosecution. The complaint in this action alleges that plaintiff is a native born citizen of the United States and a resident of New York City; that defendant, a New York Corporation wantonly and maliciously and without probable cause, by giving false information to the immigration officials of the government of the United States , caused them to prosecute, arrest and deport the plaintiff for alleged violations of United States Immigration Laws on divers occasions during certain years, and that the proceedings terminated favorably to the plaintiff. He also alleged that prior to such wrongful acts plaintiff was employed in New York City and that by reason of the malicious prosecution he was prevented from procuring such gainful occupation by reason of the deportation which covered a period of ten years. The defendant made a motion to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The court dismissed the complaint holding that the fact the United States Government deported this man from the country is not a basis for an action for malicious prosecution and such a prosecution under the immigration laws was not a judicial proceeding.

Finch, P.J., in his dissenting opinion said that for the purposes of this motion it is admitted that the defendant maliciously gave false information to the immigration officials whereby the plaintiff suffered arrest, imprisonment and deportation over a period of ten years and was ousted and prevented from following a gainful occupation. For these wrongs the plaintiff is entitled to redress, and his complaint should not be dismissed upon the ground that it fails to conform to established rules of pleading in a particular form of action. Plaintiff may not be able to obtain adequate relief in an action for libel or slander or to maintain such an action or an action for false imprisonment notwithstanding he has been libeled, imprisoned and otherwise injured. Under such circumstances the plaintiff is entitled to maintain an action wherein he may be granted appropriate relief. He cited Judge Vann in Kujek v. Goldman (150 N.Y. 176,178); who stated that while no precedent is cited for such an action as there was brought, it does not follow that there is no remedy for the wrong, because every form of action when brought for the first time must have been without precedent to support it. Courts sometimes of necessity abandon their search for precedents and yet sustain a recovery upon legal principles clearly applicable to the new state of facts, although there was no direct precedent for it, because there had never been occasion to make one. (Piper v. Hoard, 107 N.Y. 73,76; and Bolivar v. Monnat, 232 A.D. 33,38; being likewise in point).

Thus the question is presented whether this proceeding before the immigration board is one of a judicial nature within the meaning of the law of malicious prosecution, and if not, is it one of such a nature that the courts should apply such a remedy even though it is without precedent.

The essential element of an action for malicious prosecution is that a judicial proceeding has been theretofore commenced against the present plaintiff, at the instance of the defendant, maliciously and without probable cause. (Burt v. Smith, 181 N.Y. 1; Graves v. Reidman, 235 A.D. 381; Barny v. Third Ave.RR., Co., 51 A.D. 385). An action for malicious prosecution is usually based upon an arrest in criminal proceedings, although it may be founded upon a civil action when commenced simply to harass or oppress the defendant. (Pangburn v. Bull, 1 Wend. 345; Vandugur v. Lindernan, 10 Johnson 106; Bump v. Betts, 19 Wend 421; Cooley, on Torts, 187).

The procedure involved in the arrest, prosecution and deportation by the Immigration officials appears to be of a judicial nature in one sense of the term. The United States Code Annotated, Title 8, Sec. 153, provides for the duties of special boards of inquiry to pass upon the admission of aliens or the deportation of citizens of the United States. Provision is made thereby for the appointment of such special baords of inquiry by the Commissioners of Immigration, or inspectors in charge of the various ports of arrival, as may be necessary for the prompt determination of all cases of persons detained at such ports under the provisions of the law. Each board consists of three members, composed of such immigration officials in the service, as the Commissioner General of Immigration with the approval of the Secretary of Labor, shall from time to time designate as qualified to serve upon such boards. Such boards have authority to determine whether an alien who has been detained shall be allowed to land or shall be deported. The decisions of any two members of the board shall prevail, but either the alien or any dissenting member of the board may appeal through the Commissioner General of Immigration to the Secretary of Labor. The decision of the Secretary of Labor is rendered solely upon the evidence adduced before the board of special inquiry. In every case, where an alien is excluded from admission into the United States under any law or treaty, the decision of the board of special inquiry adverse to the admission of such an alien is final unless reversed on an appeal to the Secretary of Labor. This was the nature of the proceeding under which the plaintiff in this case was maliciously prosecuted by the defendant. That it is of only a quasi-judicial nature is apparent from the following authorities.

An examination of the laws of the United States relating to the regulation of immigration establishes that the Immigration Service is a part of the Executive branch of the Government of the United States (United States Code Annotated, title 8, Sections 101, 102). The duties of commissioner of immigration and other immigration officials in charge shall be of an administrative

character, to be prescribed in detail by regulations prepared under the direction or with the approval of the Secretary of Labor. (United States Code Annotated, title 8, Section 108). In carrying into effect the interest and purpose of the Immigration Laws, it has been held that an alien is not entitled to be represented by counsel at a hearing held with respect to his qualifications to be admitted into the United States. (Brounlire v. Miers, 28 Fed. (2nd) 653; U.S. v. Williams, 190 Fed. 897); and the rules of evidence need not be followed in deportation proceedings, (Sarney v. U.S., 7 Fed. (2nd) 515; Ex parte Hin Hoy You, 223 Fed. 833). A series of decisions of the United States Supreme Court have established that such hearings before executive boards may be made conclusive when fairly conducted. Before such proceedings shall be subject to judicial review the conclusions and orders made upon such hearings must be shown to be manifestly unfair or that there was a manifest abuse of the discretion committed to them by statute. In all other cases the order of the Immigration officials within the authority of the Statute is final. (U.S. v. Ju Roy, 198 U.S. 253; Chin You v. U.S., 208 U.S. 8; Tanz Tun v. Edsell, 223 U.S. 673).

Therefore the proceeding before the Immigration Board being only of a quasi-judicial nature the complaint in this action failed to state that a judicial proceeding had been commenced against the plaintiff. In Barny v. Third Ave. R.R. Co., (51 A.D. 385), the plaintiff brought an action for malicious prosecution after he had been illegally arrested by a policeman at the request of a conductor. The court held that unless the arrest is followed by a judicial proceeding there can be no malicious prosecution, and the plaintiff must seek his remedy in an action for false imprisonment. In Drew v. Potter (39 Vt. 189) the court held that the essential ground of the action on the case for a malicious prosecution is the institution of proceedings against the plaintiff in some court of law, and without probable cause; that a legal prosecution has been commenced should appear affirmatively in the declaration; an avermentof a charge and an acquittal after ten days' imprisonment without any mention of any court, justice, process and without profest of the record of any judicial tribunal, does not amount to an averment of a prosecution or judicial proceeding and a declaration in the case for a malicious prosecution containing no more is insufficient.

The courts have held rigidly to this rule although some cases appear on the surface to hold differently. Thus in Reade v. Halpin, (193 A.D.506) the defendant instituted and prosecuted lunacy proceedings against plaintiff under the Insanity Law which resulted in favor of plaintiff. The Appellate Division held that a proceeding for the committment of a person under the Insanity Law constituted the basis for an action for malicious prosecution. However, this is not in conflict with the authorities as it appeared from the complaint that the lunacy proceeding was instituted by a petition signed by one of the defendants, which was presented to "the County Judge and that defendant was examined and cross-examined therein", and that such proceeding resulted in a decision for plaintiff. The element of a judicial proceeding was thus present.

In Fulton v. Ingalls, (165 A.D. 323), the defendant presented certain charges to the police department. The court in that case did not decide whether a proceeding before the police commissioner was the basis for an action for malicious prosecution. All that it did hold was that if such a proceeding was a judicial proceeding an action for malicious prosecution would lie. If it was not a judicial proceeding an action for libel will lie. That the Court is concerned with, is whether the complaint states any cause of action. In Smith v. Smith, (20 Hun 555), the court held that an action for malicious prosecution may be maintained to recover damages for wrongfully, maliciously and without probable cause filing a lis pendens, whereby plaintiff was prevented from selling her property. The decision was later reversed in 26 Hun 573.

The Appellate Division in Al Raschid v. News Syndicate Co., Inc., supra, has therefore properly held the complaint fails to state a cause of action for malicious prosecution. Even though the false information furnished by the defendant to the Immigration Board may be privileged, so as to bar an action for libel by the plaintiff, there is till the remedy of false imprisonment available to redress the wrong plaintiff has suffered. However, as an examination of the procedure before the Immigration Board reveals, it truly has the same tendency to injure the plaintiff's legal rights along the lines of malicious prosecution as would a criminal or a civil judicial proceeding commenced simply to harass or oppress the defendant; especially since the grounds for deportation are generally of a criminal or infamous character which would be greatly injurious to plaintiff's reputation and honor. Damages for such injuries could only properly be obtained in a malicious prosecution action if the action for libel was barred because of privilege. Also an action for false imprisonment would not be adequate to fully compensate the plaintiff for such a wrong. It is therefore possible that when the case reaches the Court of Appeals that Court will take these facts into consideration andestablish an exception in the case of maliciously instituting proceedings against persons before the Immigration Officials. Until this is done, the action for malicious prosecution does not extend to proceedings which are only quasi-judicial or administrative in nature.

Matthias S. Fallis

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MASTER AND SERVANT

"ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT"

The Workmens' Compensation Laws, which have been passed in England and in several of the states in this country, have been designed as an additional benefit for the employee and as a method of his securing compensation for injuries which have arisen "out of and in the cause of employment". Due to the vast amount of litigation regarding the meaning and application of these phrases, the law on the subject has become well settled. Generally it may be said, these terms are used conjunctively rather than disjunctively, and both requirements must be satisfied before the employee may secure compensation. This means that the injury or accident must occur not only while the workman is doing the work he is hired to perform, but as a natural incident to that work - that is, the nature of the employment must render him liable to such injury.

The principles involved in a discussion of this subject may be illustrated by particular reference to the relationship which exists between the master and servant in the time granted to the servant for his sustenance during the day. This question was decided adversely to the claimant in the recent case of Johnson v. Smith, (263 N.Y. 10), to which decision three judges dissented. The claimant, who was regularly employed by the defendant, Smith, at Glens Falls, contracted typhoid fever from a cook, who was a carrier of the disease, in a restaurant at Montour Falls, to which town the claimant had been sent by his employer to sell goods. While working at Glens Falls, Johnson was paid neither for the time during which he ate his lunch nor for his lunch. However, when out of town on business for his employer, Johnson, used his discretion relating to the time and place for eating, but all his expenses on such journeys were borne by the employer. The court held that any disability which might have been inflicted during the hour for lunch, while claimant was at Glens Falls, would not have been compensable. The fact, that when out of town the claimant could select his time for lunch would be reimbursed for such expenses, would not establish a substantial difference in principle from his status at home.

Judge O'Brien stated, "His act in one place was as exclusively personal as at the other. For the time being he was exempt from duties as an employee. He was a free man and could eat when and chose. During the time he selected, his employer executed no authority over him and derived no benefit from his acts."

In analyzing the problems which are present in this case, it is important in the first place to note the construction which the English courts have placed on the terms out of and in the causeof employment, in as much as the English Statute is the forerunner of legislation in this country. They have generally recognized that

the procuring of food or other refreshments is essential to the employment of the workman, and he does not go outside his employment, when he ceases active work to secure food. This rule has been generally applied to those situations, where the employee does not leave the employer's premises to secure food. In Brice v. Floyd (2 B.W.C.C. 26) the court held that the workman does not lose his character as such while eating his lunch on his employer's premises, at a place where he may safely do so, and not at a place expressly forbidden or of obvious danger. (Cardinoff v. Gilmore, (1914) 48 Law Times 137; Blanett v. Sawyer, 1 K.B. 271).

This view is in accordance with the rule which has prevailed in this country, (Holmes Case, 267 Mass. 307; Vordy v. Joseph, 96 Pa. Super.Ct. 550; Ocean Accident & Guaranty Corp. v. Fair, __ Ga. App. __; 169 S.E. 684, Zurich General Accident & Liability Co. v. Brunsom, 15 Fed. 2nd. 905; Balos v. Tierton Fice, Clay and Porcelain Co., __ N.J. __, 133 Atl. 764; Re Sundine, 218 Mass. 1), and it would seem to be a limitation on the broader rule, which has been expressed by some jurists. They have stated that the general rule in American and English decisions is that going to lunch is an incident of employment, and the dinner hour, although not paid for by the employer, is included in the time of employment, and a temporary absence from the place of employment to procure food does not suspend such employment.

In our own state the distinction between eating on and off the premises was drawn in Matter of McInerny v. Buffalo and Susquehanna R.R. (225 N.Y. 130). The husband of the claimant, on inspection in the defendant's yards, was killed while he was proceeding to his house for lunch. The accident occurred in defendants' railroad yards about one-half mile distant from the particular yard in which he was employed. On the day of his death he received pay for eleven hours service, which included the hour he was permitted to take for dinner. The court held, in refusing compensation for his death, that the trip was ordinarily not part of his employment and did not arise "out of and in the course of employment". Judge Hiscock stated, "Where the employer requests or customarily permits his employees to eat their meals upon his premises, or in a place provided for them, the temporary interruption to their work thus caused will not be regarded as terminating their character as employees. But when an employee going for such purpose to his home or other place selected by him a substantial distance from the 'ambit' of his employment and from the employee's premises, the accident then happening to him does not arise out of and in the course of employment." (Brice v. Floyd, supra; Hill v. Blair, 182 Mich. 20).

It is difficult to see in what manner this situation differs from the case, where the employee is a salesman and ceases his employment to secure food. In both cases the eating of lunch does not further the employer's business nor result in a direct benefit to him. In both cases the employer must realize that the employee would have to eat and perhaps go into a public place, where food

is supplied, and in as much as the underlying principle behind both situations is the same the liability of the employer should not be different.

The duty of the employer, however, to furnish a safe means of access to and from the building has been recognized, and if the employee is injured, while on the way to secure food, the injury is compensable. (Re Sundine, supra; Ward v. Standard Lumber Co., La. App. 89; Monroe Co., et al v. Industrial Commission; 198 N.W. 597). In the McInerny case it was stated that the employment does not commence or end the moment the employee puts his hand to or takes it from his actual work, but includes a reasonable time and space through which he is approaching or leaving his work. This rule is due to the employer's duty to provide a safe place for the workman, and so it would have but little bearing on the Johnson case. In N.W. Wilson Construction Co. v. Ind. Com. of Illinois, (286 Ill. 632) the court in very strong language stated that an injury occurring during noon hour only arises in and out of the course of employment, when the employee is using a way he had a right to use and which was the only available way, or as safe as any other available way, to reach the place he was to eat. While this language is applied to a particular set of facts, yet it is broad enough to cover all situations where an injury is sustained during the lunch hour.

Another distinction is apparent where the employee is always on duty and subject to the employer's call. In this instance he is at all times under the dominion of the employer and the latter derives a benefit from his acts. (Mitchell v. Ball Bros. Co., 1 Md.App.Rep.1032; Industrial Commission of Ohio v. Henry, 124 Ohio State 616; Low v. General Steam Fishing Co., A.G. 1 England 523). In Matter of Crippen v. Press Co., supra, the claimant, who was a strike-breaker, was injured in an assault upon him by a striker, while returning from a restaurant with his wife, where they had procured their evening meal. The peculiar facts presented here were that the employee was on duty twenty-four hours a day, and it was part of his employment to be available to go to work whenever his employer wished to call him. The court held that he was still subject to call when he went to a restaurant. "It was evident that the employer regarded the men in his employ during a twenty-four hour day with direction and control over them, and that the employment did not cease when they left the plant, but they were merely at rest." In Remsey v. Leahey, supra, the court held that the claimant was entitled to compensation as he was obliged to live on a boat and be on hand at all times, and, as food was not brought to him, that in going out to procure it, he was doing something necessarily involved in his contract of service.

These cases are not in conflict with the position of the court in Johnson v. Smith, supra, for it is evident that at the particular time at which Johnson ate his lunch, Smith, his employer exerted no direct control over him, notwithstanding the fact that the employee's compensation was extended to cover that period. It was in Smith's contemplation that Johnson would take time out for lunch, and that during that time his business would not be furthered.

However, in the Crippen and Remsey cases at the particular time that the employees were procuring food the employer could exert authority over them, if necessary, and recall them to actual work if his business required.

Again, assuming that Johnson's injury arose in the course of his employment, it may not be said to have arisen out of such employment, or that it was a risk or hazard necessarily, ordinarily or reasonably inherent in or incidental to the conduct of such work or business. The injuries which Johnson sustained were received from a risk to which the general public was subject, it was a common risk, and the position, which he necessarily occupied in connection with his employment, did not result in his exposure to this common risk. Clearly a different situation would be presented, if Johnson were injured, while on a mission for his employer, and during the time he was walking on the street or seeking shelter from the elements. (Kaley v. Kondrms D.Co.,232 N.Y. 420; Matter of Madurd v. City of N.Y., 238 N.Y. 214).

The dissenting opinion in the Johnson case is based on the fact that he had no regular time in which to eat his lunch, and that he received compensation for both his lunch and the time during which he ate it. Judge Hubbs stated "During all the time he was in his master's service and was in the restaurant by reason of his employment and in the course of his duty to his employer and to further the business in which he was engaged." It is not clear in what manner Johnson's being in the restaurant furthered the business in which he was engaged, however, in two similar cases arising in this country, in which the same argument could have been broached, the court disallowed compensation. In Mitchell v. Ball Bros., Co., supra, the claimant's husband, a shop foreman at defendant's plant, was killed, while crossing the street from a restaurant where he ate his lunch to defendant's plant. It was held, that although he was subject to call from the time he reported to work until he reported out and had no regular lunch hour, but was authorized to obtain lunch whenever he thought his work permitted, yet the injury did not arise out of and in the course of his employment. This conclusion was based on the fact that there was no incidental connection between the conditions under which he worked and the resulting injuries. In California Casualty Exchange v. Industrial Accident Commission, supra, the driver of an ice truck, whose employer permitted him to take lunch where and when he desired, was killed while crossing the street from a lunch room to his truck. It was held that his duties did not call him to that particular store, and the injury did not arise out of or in the course of his employment.

If Johnson's duties had called him to the restaurant in which his injuries were sustained, he would have been entitled to compensation. This view is in accordance with the decision in Matter of Tannebaum v. Perfect Tailoring Co., (243 N.Y. 577). There the employee entered the restaurant to interview prospective customers and to eat lunch, and by reason of the double purpose he had in mind, the court held that a n injury, incurred by slipping on the floor, arose out of and in the course of employment.

Johnson entered the restaurant for a single purpose which had no relation to his employer's business, and in view of the long line of decisions on this subject it cannot be said his injury arose out of his employment.

In all cases the courts should safeguard the rights of the workman and secure to him all the benefits of legislation in his behalf, yet a strict application of the rules which have been enumerated is necessary, in order that the corresponding rights of the employer may not be disregarded. The employer should not be subjected to liability in those cases, where he neither exercises a control over nor derives a benefit from the acts of his employee.

Emmett J. Schnepp

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The holder in due course may be the most favored plaintiff in the law but the infant is by far the most favored defendant. An arm of guidance and protection has been raised by statute and precedent to shield the young. An unbroken tolerance toward the unmatured has prevailed throughout the annals of the law.

It is therefore of interest to find the judges of the Court of Appeals unanimously agreeing to affirm a sentence of life imprisonment imposed upon a child for the commission of a crime when he was less than sixteen years of age. Even in a case where formidable doubt of guilt does not arise, it would not be unusual to expect that the court would confer upon the unfortunate child every legal benefit of the doubt. Interest then, in this unanimous affirmance is increased when it appears that certain arguable, to say the least, points of law are involved.

The case for discussion is People v. Murch (263 N.Y. 285). Harry Murch, a child of fifteen years, had told one of his playmates that "he was going to get the Bender Boy for letting all around that he had hit the lady over the head". Accordingly young Murch induced the Bender boy to accompany him to an unfinished house in the neighborhood, where, under a pretense, he persuaded Bender to allow himself to be tied hand and foot, and then Murch stabbed him with a potato knife, causing his death.

The defendant was charged with murder in the first degree on the theory that the crime was premeditated, deliberate and with felonious intent. He was convicted of murder in the second degree. The problems of law in which we are interested arise from the charge of the lower court to the jury. The court said, "An infant under the age of sixteen years can be indicted and tried for murder in the first degree, or murder in the second degree and nothing else. Any other offense committed by a defendant under the age of sixteen years is juvenile delinquency which is not a crime". In conclusion the jury was told that its verdict might be one of three; guilty of murder in the first degree, or in the second degree, or not guilty. The defendant excepted to the charge as given and requested the court to charge the lower degrees of homicide, which request was refused and exceptions taken. In its affirming opinion, the Court of Appeals declared that the charge of the lower court was proper since the defendant was not deprived of a substantial right by the charge, since the criminal courts have no jurisdiction of the lesser degrees of homicide when committed by a child under sixteen and that consequently a verdict of manslaughter or juvenile delinquency would be a nullity.

In discussing the first ground on which the Court of Appeals based its argument, that the defendant herein was not deprived of a substantial right by the refusal to charge the lesser degrees of crime, the provisions of three statutes should be noted. The

law provides that upon the trial of an indictment, the prisoner may be convicted of the crime charged therein, or of a lesser degree of the same crime. (Penal Law, §610). By statute it is also declared that upon an indictment for a crime consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any other degree -- warranted by the evidence. (Code of Criminal Procedure, §444). And finally it is decreed that in charging the jury, the Court must state to them, all matters of law which it thinks necessary for their information in giving their verdict. (Code of Criminal Procedure, §420). "These New York Statutes empowering the jury to convict of a lesser degree of crime than that charged in the indictment or of an attempt to commit a lesser degree of the same crime, is largely declaratory of the common law rule on the same subject." (People v. Schlieman, 197 N.Y. 383).

The purpose for the enactment of these statutes was to prevent the prosecution from failing when the facts and circumstances of the graver crime were not completely proved, but when those, which were proved, made out a crime of an inferior degree. (Dedieu v. People, 22 N.Y. 178; People v. Miller, 143 A.D. 251). Thus if the indictment charged murder in the first degree but the proof when complete on the trial only made out the elements of the crime in the second degree, it was intended that such a conviction should be possible, rather than allow the entire prosecution to fail.

The practical result of these provisions, however, has been to allow the jury to choose between several verdicts, which may or may not be more favorable to the defendant. In People v. Seiler (246 N.Y. 262) this result was recognized when the court said; "Doubtless there are cases where a jury, instructed that it has the power to find the defendant guilty of a lesser degree of homicide than charged in the indictment, will exercise that power, though it would bring in a verdict of guilty as charged if no other alternative were presented. On the other hand a jury may at times bring in a verdict of not guilty, though it is convinced of guilt, if it quails before the responsibility of bringing in a verdict which carries with it the penalty of death. The defendant may be helped or harmed by a charge that the jury has power to convict of a lesser degree of homicide, according to the steadfastness and conscientiousness of the particular jury sitting in the case".

However it is well settled that, where there is evidence to show that a crime in a lesser degree may have been committed, it is prejudicial not to charge those lesser degrees. (People v. Young, 96 A.D. 33; People v. Monat, 200 N.Y. 308; People v. Seiler, supra). It may be said in opposition to this theory that the jury, when only charged as to the elements of one superior crime, will find the defendant guilty of that crime by applying the law to the proof, in the exercise of its duty, fairly and justly; and if the proof were not sufficient, that they would not convict. But that argument is based wholly on the proposition that the verdict

of the jury will be brought in after they have applied the law, as instructed, with unfailing accuracy, to the proof. It cannot be doubted that if a jury were told that they could only find a defendant guilty in the first degree or not guilty, and the proof showed clearly that he was guilty of murder in the second degree, their inclination would be to convict him of murder in the first degree rather than allow him to go absolutely free. The life and liberty of a man should not thus be cast to the caprice of twelve minds delving into the subtleties of proof and law. Nor should the fact that the prisoner might be favored by such a charge lend a foundation for its validity. For, as in the supposed case where the jury was charged that it might find the prisoner guilty only of murder in the first degree, it may be said that if the proof merely showed that he was guilty of manslaughter in the second degree, the jury would be apt to bring in a verdict of not guilty, whereas, if they had been charged as to the lesser degrees they would have found him guilty of that inferior crime. Such speculation as to whether the defendant is harmed or favored, should not determine the legality of illegality of the charge. "We cannot overlook the failure of the court to give proper instructions". (People v. Marendi, 213 N.Y. 600). "We may not sustain a conviction erroneously secured on one theory, on the conjecture that it might have followed just the same if the correct theory had been applied" (People v. Smith, 232 N.Y. 239). "We cannot say that with proper instructions but one decision, and that adverse to the defendant, could reasonably have been reached" (People v. Koerber, 244 N.Y. 147).

In People v. Young, supra, the court sums up the situation. There the defendant was surprised in the midst of a burglary. He fled, over fences, through back yards, and finally climbed a fire escape. There a man attempted to stop him and the defendant killed him. The trial judge charged that the jury should find the defendant guilty of murder or of nothing at all. The defendant's counsel asked for instructions as to the various degrees of homicide. This was refused and conviction followed. The Appellate Court decided that the instruction was erroneous. "Homicide is the killing of one human being by the act, procurement or omission of another. (Penal Law, §179). It is divided into four degrees, murder, manslaughter, excusable homicide and justifiable homicide. (Penal Law, §180). Murder and manslaughter are each subdivided into two degrees. (Penal Law, §§183, 184, 189, 193). Upon an indictment for a crime consisting of different degrees the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto, or of an attempt to commit the crime, (Code of Criminal Procedure, §444), and whenever there is a reasonable doubt in which of two or more degrees a defendant is guilty, he can be convicted of the lowest of those degrees only, (Code of Criminal Procedure, §390)."

"The trial judge, therefore, could not charge as a matter of law that the defendant was guilty of murder, first or second, or nothing at all, nor could he refuse when requested to tell

the jury what were the various degrees of homicide. Under the instruction given, the jury was prohibited from doing what the legislature of the state has said that it might do, namely, find the defendant not guilty of the crime charged and guilty of any inferior degree thereof".

"Where a person has been indicted for the commission of a crime of which there are various degrees, the court cannot, when requested to do so, refuse to tell the jury what those degrees are, or prohibit the jury from finding a defendant guilty of any-one of them inferior to that charged in the indictment. The verdict may not be justified by the evidence, but the statute permits the jury to make the finding, and there is no power in the court to prohibit it (McKenna v. People, 81 N.Y. 360; McNevins v. People, 61 Barber 307)."

It should be remembered that the necessity for instructing as to these lesser degrees depends on whether there is any evidence to show that a lesser degree of the crime has possibly been committed (People v. Monat, supra; People v. Seiler, supra). Where there is no possible view of the evidence which would justify any verdict, other than a conviction of the crime in the first degree or an acquittal, the refusal to charge the various degrees of the crime was right (People v. Schlieman, supra; People v. Chapman, 224 N.Y. 463; People v. Walsh, 262 N.Y. 140). The conditions are exceptional however, which warrant a refusal to instruct the jury as to their power to convict of a lower degree of the crime charged and great care should be observed not to withhold such instruction except in a proper case (People v. Schlieman, supra). This question of whether the evidence would warrant the jury, in the case under discussion, in finding the defendant Murch guilty of a lesser degree of homicide does not arise since the court concedes this point. "We will assume - though the evidence makes the assumption somewhat difficult - that if the defendant had been over the age of sixteen years or an adult, it would have been error not to charge the degrees of manslaughter (People v. Murch, supra)."

We therefore are led to the conclusion that the Murch case presented a proper situation calling for the instructions as to the lesser degrees of homicide, for we have seen that, when it is possible to convict of a lesser degree, it is prejudicial to the defendant not to so charge. It is necessary to look for other factors which control the circumstances of this case in order to justify the decision of the Court of Appeals that the defendant was not deprived of a substantial right.

The controlling factor in this case rests primarily in the court's decision that the criminal courts have no jurisdiction of these lesser degrees of homicide when committed by a child under sixteen and that consequently a verdict of manslaughter would be a nullity.

The law provides, "that a child of more than seven and less than sixteen years of age, who shall commit any act or omission which, if committed by an adult, not punishable by death or life

imprisonment, shall not be deemed guilty of any crime but of juvenile delinquency only" (Penal Law,§§486, 2186). Accordingly a child under the age of sixteen is responsible only for the crimes of treason, murder in the first and second degrees, and under certain circumstances, kidnapping, (Penal Law,§1250), for these are the only crimes now punishable by life imprisonment or death.

The statute was clearly intended to prevent a young child who has had the misfortune to commit a crime from being punished and stigmatized as a criminal, (People v. Lewis, 260 N.Y. 171). The thought immediately arises, does this statute decree that the infant under sixteen, who commits a crime other than the above four, is absolutely incapable of committing that crime, or does the statute merely prevent the punishment of that crime, conceding that in fact it has been committed. For if the infant is capable of committing the crime but is not liable for the ordinary punishment it would seem that the charge in the Murch case was erroneous. This would seem logical for if Murch were in fact capable of committing one of the lesser degrees of homicide than the trial Judge charged, the mere fact that he would not be responsible for the ordinary punishment would not be a valid reason for not allowing the jury to consider those lesser degrees of the crime.

The answer to this question is illustrated by another interesting case which was recently decided by the Court of Appeals. In People v. Roper, (259 N.Y. 170) the defendant was between ages of fifteen and sixteen. He was indicted for first degree murder committed in the course of a felony. It is well settled that an adult who kills another person while he is perpetrating a felong is chargeable with the crime of murder first degree, regardless of his intent or deliberation (Penal Law, §1044; People v. Rogers,192 N.Y. 331; People v. Ferrara, 199 N.Y. 414; People v. Trybus, 219 N.Y.18). The facts showed that the infant defendant had killed a restaurant patron during a holdup. The case was sent to the jury on the question whether there had been a killing of a human being during a robbery in which the defendant was a guilty participant. The jury convicted and on appeal it was held that the judgment of conviction could only be sustained if the defendant's participation in the felony established the necessary element requisite to murder in the first degree.

The Court of Appeals said, "The crime of murder charged in the indictment is a single crime, whether by design, or during the commission of an independent felong; 'the independant felony, like the deliberate and premeditated intent, being established solely for the purpose of characterizing the degree of the crime charged, the evil mind or purpose inherent in the killing' (People v. Lytton, 257 N.Y. 310)".

"The defendant may have been engaged in the robbery or felony when the deceased was killed but unless 'the participation was with felonious intent, he was not guilty of the felony; and if he was not guilty of the independant felony, participation does not evince the evil mind or purpose inherent in the killing' (People v. Koerber, supra). The Penal Law decress that the acts of a

child shall in all cases other than acts constituting a felony punishable by death or life imprisonment, be treated as done without the evil mind which characterizes felonious intent.

Thereupon the Court of Appeals reversed the conviction against the defendant Roper since he was incapable of committing the felony of robbery to furnish the 'evil mind' required to effectuate first degree murder committed during a felony (People v. Roper, supra). (It is interesting to note that at the time of the commission of the Roper crime, the crime of robbery, the felony relied upon to constitute murder in the first degree, had a maximum penalty of life imprisonment if the jury so advised. Thus if so found, the child in this case may have been capable of committing the felony of robbery since it would come under the statute, if the punishment were life imprisonment. The statute was reduced during the course of the prosecution, reducing the punishment from life to a maximum of thirty years (Penal Law, §2192 as amended by Chapter 875, Laws of New York, 1932).

Thus it is shown that an infant under sixteen is absolutely incapable of committing a crime except where the punishment is life imprisonment or death. The statutes are interpreted as not only preventing the punishment for other crimes but also as entirely obviating the ability to commit these other crimes. Therefore, since this result obtains, the failure of the trial judge in the Murch case, cannot be erroneous on the theory that the defendant might have been capable of committing a lesser crime.

The next point in the argument of the court is that the criminal courts have no jurisdiction of a lesser degree than those charged, since such a crime would constitute juvenile delinquency, The court says that if such were the verdict the court would have no jurisdiction and any verdict would be a nullity. Consequently, they conclude that the failure to charge was not reversible error.

Under the Children's Court Act (254 Laws of New York 1924) "the Children's Court shall have exclusive original jurisdiction to hear all cases, proceedings, etc. involving children under the age of sixteen years who are (1) delinquent --." This on its face would seem to settle the matter for the words of the statute plainly indicate its meaning. It is however a settled rule of law in all criminal cases that a superior court often has jurisdiction of a lesser degree of crime, which it would not have had in the original instance (People v. McTanneny, 30 Hun 505).

"As a general rule the jurisdiction of a court depends upon the state of facts existing at the time it was invoked, and if the jurisdiction once attaches to the person, the subsequent happening of events, although of a character that would have prevented jurisdiction from attaching in the first instance will not operate to oust jurisdiction already attached" (16 C.J. 181, §§246, 247). The reason for this conslusion is that the prosecution might fail if the first count were prevented from completing the determination of the case. In People v. McTammeny, supra, the defendant was in-

dicted for grand larceny and tried before the Oyer and Terminer, a court of superior jurisdiction. The jury found the defendant guilty of petit larceny, which was a crime exclusively within the jurisdiction of the Court of Special Sessions, an inferior court. It was held that the provision of the Code of Criminal Procedure giving the inferior court exclusive jurisdiction, did not prevent the superior court from continuing its jurisdiction since it had been validly conferred in the first instance. In other jurisdictions the same rule established (State v. Scott, 4 Pen.(Del.) 538). In People v. Schoenith, (3 Mich. 204) the offense charged was tried in the recorder's court which had jurisdiction of the crime charged. The defendant was convicted of a lesser crime, not originally within the jurisdiction of the court. It was held the the mere fact that the conviction is of a lesser degree included within the greater, does not oust the court from jurisdiction because it would not have had jurisdiction of that lesser crime in the beginning. It is therefore, a well settled rule that the court, if possessed of valid jurisdiction in the first instance, will retain it, though the crime actually adjudicated would not originally have been properly within that jurisdiction (People v. Knatt, 156 N.Y. ; Ex Parte Bell, 100 Cal. XVII; Reynolds v. Comm., 94 Va. 816; Winburn v. State, 28 Fla. 339; Fleming v. State, 107 Ala.12).

In connection with the Murch case it may well be asked whether the court, having valid jurisdiction of the defendant in the first instance, should not have retained that jurisdiction in case the jury had found a verdict of a lesser degree of homicide resulting in juvenile delinquency. Applying the general rule it would seem that the court should retain its jurisdiction, and therefore the charge of the Trial Court, that a verdict of juvenile delinquency would be a nullity, appears erroneous. But the Court of Appeals rules that under our statutes of jurvenile delinquency, "exclusive jurisdiction to hear and determine the cases of children under the age of sixteen years, who are charged with juvenile delinquency is delegated to the Children's Court" (People v. Murch, supra). The statement of the court is merely a repetition of the words of the statute, but the result is actually an interpretation thereof, to the effect that these circumstances present an exception to the general rule that once the court has jurisdiction it will retain it to a final determination.

Such a result has not been reached in Tennesse where the only substantial difference between the statutes relating to juvenile crime, is the addition of the crime of rape to the crimes which a child under the age of sixteen is capable of committing. In Howland v. State, (151 Tenn. 47) the defendant was a girl under the age of sixteen charged with murder. The jury found her to be guilty of manslaughter, a crime which was not within those enumerated by statute. Thereupon the court sentenced the defendant to five years of vocational school for being a delinquent. The defendant moved in arrest of judgment on the ground that when the jury found the defendant guilty of a crime of a lesser degree than rape or murder, the court lost jurisdiction. This contention was rejected on appeal on the ground that the indictment in the first instance gave the court the necessary jurisdictional facts which

it could not lose merely because of the verdict of the jury. This case definitely raises and decides the point as to whether the court should follow though with its jurisdiction in the case of juvenile delinquency. The ruling of the foreign state is, of course, not binding the courts of New York, but it is interesting to note the variance between the holdings.

In the Murch case the court decides that the criminal courts only have jurisdiction of those crimes which a child is capable of committing, and of those crimes alone. The decision, based strictly on the wording of the statutes, appears to be proper. In this instance the lower court was within the law when it charged as it did. The charge, literal though the interpretation was, has received the affirmance of the Court of Appeals.

That there is room for argument as to the prejudicial aspect of this interpretation is readily evinced by a case which appears to parallel the one in discussion in every aspect. In Templeton v. State (146 Tenn. 272) it was conceded that the defendant was fourteen years of age. He had apparently been in love with the deceased, a girl of about the same age, and threatened to shoot anyone who went with her. An argument arose one day between the defendant and the deceased while the former was on his way to be in a wild west show in his school, and the defendant shot the little girl with a revolver he was carrying. The prosecution contended that the revolver was purposely fired. The defendant was found guilty of second degree murder. On the trial the judge refused to instruct the jury with respect to the law of manslaughter, basing his decision on the conception that, since the court had no jurisdiction to try this defendant for manslaughter, there was no duty to instruct the jury upon the subject of these offenses. The statutes on the question of juvenile delinquency were substantially like those of New York State.

On appeal the court held, "This conception of the lower court was unsound. The indictment charged the defendant with murder in the first degree, and this necessarily embraced the charges of voluntary and involuntary manslaughter. The statute required him to give, in the charge to the jury, the law of these lesser grades of homicide. The fact that the juvenile court has exclusive jurisdiction of these offenses did not relieve him of that duty. It may be that he could not punish the defendant for such offenses; but, if the defendant was guilty of either one of these lesser grades of homicide, he was not guilty of murder, and it was essential for the jury in determining whether he was guilty of murder in the first or second degree, to know the law in respect to the lesser grades of homicide; and therefore, the mere fact that the circuit court might not have jurisdiction to deal with the offender in the event the jury found him guilty, it was nevertheless his duty to explain the law to the jury in order that they might apply that law in determining whether he was guilty of anyone or none of these offenses."

This opinion, although coming from Tennesse, which was the same state that declared that the court could have followed through its jurisdiction if the defendant had been guilty of juvenile delinquency, is based on an entirely different theory. The theory is that since the jury did not know the elements of the lesser grades of the crime, it could not intelligently reach a verdict. This concededly is a sound basis for an argument and in the Murch case the court realizes it and forthwith decides the other way. The court says, "The one point in the case upon which any doubt at all exists, is whether or not the jury, under the instructions given, understood clearly the scope of its choice of verdicts. Merely to tell the jury that any offense other than murder in the first degree or murder in the second degree, committed by a defendant under sixteen years of age is juvenile delinquency, and that juvenile delinquency is not a crime, was to state the law somewhat baldly. Section 420 of the Code of Criminal Procedure contemplates information to the jury on all matters of law necessary in giving its verdict. It is conceivable that a jury in a case of this kind could perform its duty more intelligently if it were told what acts by an adult would constitute manslaughter; that like acts by the defendant would not be a crime but would be juvenile delinquency. And, if found on the evidence to have been committed by him would lead to an acquittal; but that the defendant nevertheless could be dealt with as a juvenile delinquent and in that case what the consequences would be and why. But the trial judge was not requested to charge as to any of those matters. His omission to do so, if error at all, was error of fact and not of law." (People v.Murch, supra).

Thus we find that the Court of Appeals, interpreting the statutes rigidly, has added a further aspect of stringency in its declaration that, at least, in this case the jury could intelligentl reach a verdict without considering the elements of the lesser degrees of the crime in question. We cannot argue with their endeavor to apply the law as it is written. We cannot dispute that a correct and logical conslusion has been reached. Whether the remoreselessness of this logic has consipred to effect an injustice does not readily appear under the circumstances of this case. Undoubtedly justice has been done. The future case alone will reveal whether the better wisdom would have been to follow the more liberal path.

George S. Collins

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USURY - FORBEARANCE

If we look back upon history, we shall find that there is scarcely a people, ancient or modern, that has not had usury laws. In the earliest times, the taking of interest for the loan of money, but of later times the taking of excessive interest only, has been regarded with abhorrence. At first usury was regarded as against the laws of God:

> "If you lend money to any of my people that is poor by thee, thou shalt not be to him as a usurer, neither shalt thou lay upon him usury". Exodus XXXII, 25. (See also Leviticus XXII; Psalms XV, 5; Matthew XXV, 25).

In ancient Rome usury was limited by the Twelve Tables, Tacitus (Ann.lib. 6 ch. 16). By the Twelve Tables the taking of interest was limited to one per cent, later reduced to one-half of one per cent. Commercial necessities later caused the abolition of the usury law. By the laws of Justinian the practice of exorbitant interest was severely restrained. The early Roman law makers did not base their usury laws upon the laws of God but upon public policy.

Most of the usury laws in New York State today were modeled after the early English Act (St. 12 Anne ch.16). Peculiar as it may seem, however, England in 1854 by (St. 17 & 18 Vict, c.90) repealed all usury statutes and now the borrower and lender may, without restriction, agree upon any rate of interest subject to a statutory power of the courts to set aside or vary. This statuatory power, hoever, does not run against all classes of lenders. It runs against only those who come within the meaning of the Money Lenders Act of 1900 (63 & 64 Vict. c. 31) as a "money lender". Whether or not a lender comes within the provisions of this act is a question of fact, more or less infrequent lending not being sufficient. If the transaction is harsh and oppressive the borrower may obtain relief. In Judging whether the charges are excessive the court considers the needs of the borrower, his financial position, the presence or absence of security and its amount, the relation of the parties and the total remuneration received from the borrower by the lender.

There is not space here to review the arguments for and against these statutes nor the propriety of them. Such arguments resolve themselves into the reconcillation of two things which Lord Bacon, with his usual sagacity, in his essary Number 41 concludes:

> "The one that the tooth of usury be grinded, that it bite not too much, the other, that there be left open means to invite moneyed men to lend for the continuing and quickening of trade".

And then he recommends a rate of five per cent. for ordinary cases and a higher rate in matters of trade.

The New York Statutes pertinent to our discussion are Section 370 G.B.L. which provides:

> "The rate of interest upon the loan or forbearance of any money, goods, or things in action, except as otherwise provided by law, shall be six dollars upon one hundred dollars, for one year, and at that rate for a greater or less sum, or for a longer or shorter time".

and Section 371 G.B.L. which provides;

> "No person or corporation shall directly or indirectly take or receive in money, goods or things in action, or in any other way, any greater sum or greater value, for the loan or forbearance of any money, goods or things in action, than is above prescribed".

To constitute usury there must be: 1. A loan or forbearance of money: 2. A taking or reservation of more than the legal rate of interest: 3. Such taking in pursuance of a corrupt agreement (Pomeroy v. Ainsworth, 22 Barb 118; Dry Dock Bank v. Amer. Life Ins. & Tr. Co., 3 N.Y. 344). Although the statute forbids the taking of a higher rate of interest than six percent "for the loan or forbearance of any money, goods or things in action" judicial decisions have limited the application of the section to a loan of money. It was said in Title Guaranty etc. Co. v. Klein (178 Fed. 689):

> "It has long been well settled by the decisions of the Court of last resort in the State of New York, as well as elsewhere, that such usury laws are applicable only to a loan of money, and that the terms "interest" and "forbearance" cannot be predicated of anything other than a loan of money".

This ruling was first made in construing the statute of 12 Anne, which applied to loans of goods, wares and merchandise. The reason for allowing a greater return on goods, etc., other than money is because money is presumably the only commodity which is not subject to fluctuation while owing to the fluctuations in value of other commodities, the thing returned plus the increment may be less in value at the time of the return of the chattels than the value of those at the time of the loan (Notes, 55 Am.D. 396).

The word money has been interpreted to include bank bills, bank notes, checks to credit, and a debt whether due by bond or otherwise (94 Va. 434, 438; 34 S.E. 60).

Because of such an interpretation of the statute there arose attempts to evade it by divers subterfuges based upon the theory that the transaction was not a loan of money. The courts have striven in all such cases to look beneath the surface of the transaction and expose any pretense of contrivance whatever, whereby the lender attempted to evade the statute by circuitousmethods to cover up a loan. Amony the commonest forms of transactions that may or may not be used to cover up a usurious loan is the loan of credit. This was the case in Dry Dock Bank v. American Life Insurance & Trust Company, supra, which was declared to be a loan of money and not of credit. The courts have held it to be a question of fact for the jury as to whether or not the transaction is a loan of money. But where the transaction is capable of an innocent construction, and can only be held usurious by imputing to the facts a sense which is strained, it is the duty of the court not to adjudge a forfeiture. There being no presumption that a contract is illegal or criminal, the illegality must be proved (Maker v. Fiero, 145 N.Y. 165). So numerous have been the subterfuges it would not be valuable further to discuss them here.

The recent case of London v. Toney (263 N.Y. 434) brings up the question as to what is a forbearance. Blacks Law Dictionary defines forbearance to be a delay in enforcing rights on the suspension of an existing demand, refraining from claiming a right. In Reynolds v. Ware (5 Wend. 501 at 504), Marcy, J., in pointing out that a mere promise to forbear without consideration was a nudum pactum said:

> "Forbearance, in the legal sense of the word, is an engagement which ties up the hands of the creditor depriving himself, by something obligatiory of the power to sue".

In London v. Toney, supra, the plaintiff's assignor held a purchase money mortgage on real estate belonging to the defendant but recorded in his wife's name. When the defendant's wife acquired the record title she took subject to but did not assume the mortgage. In June 1929, the mortgage became due and $20,700 was payable thereon. An agreement was entered between the mortgagee and the defendant and his wife whereby the former extended the time of payment of the mortgage in consideration of the defendant wife's assumption of the debt and the defendants guaranty of payment of the debt. In addition the mortgage required the defendant to execute notes in amount of $1500. The defendant's wife defaulted and the plaintiff brings the action on the guaranty. The defense of usury was interposed. The plaintiff contended that there could be no usury unless there be an actual loan; that forbearance is insufficient; and that since a purchase money mortgage is not given for a loan but merely represents security for a deferred payment, cases of forbearance of

money where there is the assumption of a debt other than a debt represented by a purchase money bond and mortgage and the extention of its payment have no application. The court rejected this argument and held for the defendant, declaring the guaranty of payment void for usury, saying:

> "Although instances of usury occur more often in loans than in other transactions, a loan, as that term is generally understood is not a prerequisite of usury. In Van Schaick v. Edwardo (2 Johns.355, 364), a case involving the validity of notes given for the purchase of land, distinguished judges interpreted a usury statute which forbade excessive interest "for the loan or forbearance of moneys or other things actually lent or sold". In the opinion rendered by Kent, Jr., occurs this summary of the law. "Usury is the taking of more than the law allows, for the forbearance of a debt; and whenever a debt is created, and there is an agreement to pay more than legal interest for forbearance of payment of it, such agreement is usurious".
>
> "No statute and no decision by this court have been called to our attention by which forbearance of money must, in order to constitute usury, be preceded by an actual loan. The contrary is true. Either a loan or forbearance of money may be usurious".

It will be seen that all this case decides is that the extension of time and guaranty of payment are void for usury. The deferred payment of purchase price was due. It was a debt. The usurious guaranty of payment was exacted as consideration for forbearance. The case of Ganz. v. Lancaster (169 N.Y. 375) is in point with such a holding. In the latter case theplaintiff required as a condition of granting an extension of time for the payment of amortgage that the defendant assume it and pay $800 to the plaintiff. The court held this to be usurious and exempted the defendant from her assumption agreement, saying:

> "Where money is owing upon a contract for the repayment of a loan and forbearance is given for such debt upon the condition of receiving more than the legal rate of interest such forbearance is as much usury as if the sum of money had been absolutely loaned upon a contract to pay more than legal interest".

London v. Toney, supra, does not, other than by way of dicta, settle that a purchase money mortgage may be the subject of a usurious contract. On first blush, this point may appear too simple to be controverted. There have, however, been cases which might present an arguable basis for saying that it may not

be the subject of a usurious contract. These cases, however, are explainable.

In McAnash v. Blauner (222 A.D. 381 affirmed 248 N.Y. 537) the plaintiff sued on a promissory note made and payable in Florida at 8% interest. The note was given as part purchase price of certain real estate in Florida. The defense of usury was interposed. The court held for the plaintiff, saying:

> "There was in fact no usury. A contract which provides for a rate of interest greater than the legal rate upon a deferred payment which constitutes consideration for a sale is not usurious. But even if it were, it is not disputed that eight per cent. is not legal interest in Florida."

This case was follows in Florida Land Holding Corp. v. Burke, (135 Misc. 341) which was a case similar in all respects. These cases are not, however, of the highest authority. Affirmance without opinion is not the adoption of the reasons set forth in the opinion of the court below, so as to establish a precedent for future action (People ex rel Palmer v. Travis, 223 N.Y. 150). As authority for such a holding the court cited (Meaker v. Fiero, 145 N.Y. 165; Orivs v. Curtiss, 157 N.Y. 657; and Frank v. Davis, 23 Abb.N.C. 419, affirmed 127 N.Y. 673).

In Meaker case, supra, the facts were as follows: In 1883, one Hoskins executed to plaintiff's testator a bond and mortgage in the sum of $2500. Hoskins later bid in certain property for the defendant for $800. holding title in his own name to secure his advance. Later, wishing to reduce his debt to $1000. Hoskins plaintiff's testator, and the defendant agreed that Hoskins should pay to the plaintiff's testator $700., in cash, transfer the property bid in for the defendant to himand the defendant was to give the plaintiff's testator a bond for $800. secured by a mortgage on the property. At the closing date of the agreement the plaintiff's testator demanded of and received from the defendant the additional sum of $15. The defense to the action to foreclose the mortgage was usury. The court held that usury could only be found where there was a loan or forbearance of money. That in this case there was merely a change of security. Such a transaction cannot be the basis of usury as the security taken in place of that given up may not be of the same value. In that case, the court also said:

> "It is perhaps unnecessary to repeat what has often been said that usury may exist although the transaction does not take the direct form of a loan of money",

which supports rather than defeats an argument that a purchase money mortgage is not a subject of usury.

In the Orvis case, the plaintiff and the defendant entered into an agreement to enter a joint venture for the purchase and sale of stock. The defendant guaranteed the plaintiff against loss on the capital advanced by the plaintiff and that his profits should amount to a certain sum. A loss resulted. The plaintiff sued on the guaranty and the defendant set up usury as a defense. The court holding for the plaintiff said:

> "It is a fundamental doctrine governing the law of usury that the defense must be founded on a loan or forbearance of money. If neither of these elements exist there can be no usury however unconscionable the contract may be ---. It was a joint venture between two persons to deal in property in order to make a profit - -. The fact that one of them mayhave advanced the capital and the other had agreed that in consideration of such advance he should participate more largely in the profits, does not convert such an agreement into a loan of money or conflict with the statute against usury. The contract is still one of partnership".

In the Frank case, supra, the plaintiff's assignor had entered a contract with one Hatch to sell certain real estate. Title was to pass March third, 1887. Hatch failed to fulfill his contract. Later, in settlement of their differences, it was agreed that the property should be conveyed to the defendant who was to give back a purchase money mortgage in the sum of $5500. It was dated March 1st, 1887, and bore interest at the rate of six per cent. from that date. It was in fact executed and acknowledged July 14th, 1887. In defense to the foreclosure suit usury was interposed. The court held the mortgage was not usurious saying:

> "No usury can be predicated on an agreement to sell real estate, and receive in payment therefore a purchase money mortgage bearing the legal rate of interest from a date prior to the agreement. In such a contract the provision for computing interest from some past date is simply a means of increasing the purchase price. The transaction involves neither a loan of any money nor any forbearance in respect to a pre-existing debt".

It is to be remembered that in the McAnash case, and the Florida Land Holding Copr., case, supra, the validity of the notes under the well settled rules of conflict of laws was to be determined by the laws of Florida where eight per cent. interest is not usurious. And this is probably the ground on which the Court of Appeals affirmed the decision of the lower court. In London v. Toney, supra, the court disposes of the

Orvis case and the Meaker case by saying:

> "The opinion dealt with the concrete issue before the court and was not intended as a general essay".

In the Frank case, supra, it is to be noted that the mortgage bore interest at the "Legal rate" and the court, from the facts of the case, could see that it was meant as an increase in the purchase price. The holding in that case should be confined to its own facts. The Court of Appeals in the London case has expressed its view, in the strongest way possible, of a question not directly before the court, that a purchase money mortgage is the forbearance of a debt within the meaning of Section 371 G.B.L.

It may be well to point out that in the London case the plaintiff, although he has lost his right to sue on the guaranty of payment and hold the defendant's wife for a deficiency judgment, has not lost his right to sue to foreclose the mortgage. The bond and mortgage were valid in their inception, and the usurious agreement for the extension of the time of payment did not affect their validity. The agreement for forbearance was void but the original debt and securities given for it remained in full force (The Real Estate Trust Company v. Keech, 64 N.Y.284).

Harry J. Bartle

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REAL PROPERTY - LIABILITY OF LANDLORD TO INVITEE OF TENANT

The recent case of Piece v. Hunnewell (189 N.E. 77) gives rise to an interesting question. In that case defendants owned a five story building in Boston and leased parts to different tenants. The Plaintiff, a printer, had come by way of a stairway to have some paper ruled by the tenant of the third floor. When the paper was ready, it was placed on the main part of the third floor packed in bundles. The plaintiff picked it up and in the dim natural light went to the elevator, which was of the factory type, and in which the electric light was not lighted at the time. There was no operator. An automatic guard bar was installed designed to rise as the elevator came to a floor so that persons could get off; to remain up until the elevator started again and then to fall in place barring the opening, into the elevator well. The plaintiff saw the guard bar up, thought the elevator was at the third floor, and stepped in. In fact, the elevator was at rest at the fourth floor and the plaintiff fell to the bottom of the well.

The defendants did not claim that they exercised reasonable care in control of the elevator for at the time of the accident it lacked the effective automatic guard and the light required by regulations for elevators in force in Boston (Milbury v. Turner Center System, 274 Mass. 358). Furthermore they made no claim that plaintiff was guilty of contributory negligence. The entire defense was based on the fact that defendants furnished the elevator so far as it was for the use of the third floor tenatn under the terms of a lease to that tenant, by which said tenant was to have the use of the elevator free of charge in common with others but entirely at the lessee's own risk, with no liability on the part of lessors in any event, the lessee to bear the duty of maintenance and repair in common with the other tenants. Notwithstanding these provisions the defendants in fact furnished the power made the repairs and kept it in order.

The court sustained the defense and non-suited plaintiff, saying in substance that where the tenant has a right to use an elevator only at his own risk, a vistor having business with the tenant may use it only on the same terms though they are in fact unknown to him. Such person, it says, is merely a licensee. If such were the case, all well and good, as the duty owed a licensee differs widely from that owed to an invitee. However it would appear that the court was laboring under a misconception as to the meaning and practical application of the words "license" and "invitee". Thus its erroneous conclusion of no liability.

In the first place the law is settled that a visitor to a tenant may not be bound, as is the tenant, himself, by a contractual limitation in the lease, of the right to recover for negligence of a landlord in the control of elevators and other common passageways (Clarke v. Ames, 267 Mass. 44; Kirshenbaum v.Gen-

eral Outdoor Advertising Co., 258 N.Y. 489). A party may not shield himself from liability to a third person merely by stipulating with another party that he is something which in realty he is not (Finegan v. Piercy Contracting Co., 189 A.D. 699; Buck v. Standard Oil Co., 249 N.Y: 595). This was clearly brought out in a late case (Robbins Co. v. Navigazione, 261 N.Y. 455). In that case a towing company agreed with an owner of a steamship to tow it but there was to be no liability on the part of the towing company for its negligence as they were to be considered the agents of the owner of the steamship and not independent contractors. In an action for negligent injury to the property of a third person the court held that such limitation of liability was not valid as to third parties.

The court in deciding that plaintiff in the case at bar was a licensee, not an invitee, passed over the question neatly by not bothering to look into the ramifications of the rule it stated "We have no occasion to consider whether a visitor to a tenant may have greater rights than the tenant where the landlord has given the visitor some form of direct invitation as has assumed some control of his person." Of course neither were present in this case but they need not be present in order to predicate liability on the part of the landlord. It is enough if the invitation was implied (Plummer v. Dill, 156 Mass. 426).

It is proper at this point to consider the meaning of invitation license and, after that has been determined, the duties owing to an "invitee" as against those owing to a "licensee".

There is a clear distinction between a "licensee" and an "invitation" to enter premises and an equally clear distinction as to the duty of the owner in the two cases. An owner owes to a licensee no duty as to the condition of the premises, save that he should not knowingly let him run on a hidden peril or willfully injure him. To one invited, however, he is under obligation for reasonable security for the purpose of the invitation (Mandeville Mills v. Dale, 2 Ga. App. 607). As respects the question whether a person is on premises as a licensee or by invitation, "invitation is inferred where there is a common interest or mutual advantage, while 'license' is inferred where the object is the mere pleasure or benefit of the person using it." (Southern R. v. Goddard, 121 Ky. 567; Wharton Neg. 349).

A licensee who goes on the premises of another by that other's invitation and for that other's purposes is an "invitee" and the duty to use reasonable care to prevent injury is at once raised, and the word "invitation" in the rule, covers and includes in it, inticement, allurement, and inducement, if the case holds such features; and the invitation may also be implied by a dedication, arising from known customary use, for it may be implied from any state of facts on which it naturally and reasonably arises (Glaser v. Rothschild, 221 Mo. 180).

Implied invitation is part of the law of negligence, by which an obligation to use reasonable care arises from the conduct of the parties. Its essence is that the defendant knew or

ought to have known that something that he was doing or permiting to be done might give rise in an ordinarily discerning mind, to a natural belief that he intended that to be done which his conduct had led the plaintiff to believe that he intended. It is not enough that the user believed the use was intended. He must bring his belief home to the owner by pointing to some act or conduct of his that afforded a reasonable basis for such belief (Furey v. N.Y.C., 67 N.J.L. 270; Lepnick v. Gaddish,72 Miss. 200).

In a legal sense, to come under an implied invitation as distinguished from the mere license the visitor must come for a purpose connected with the business in which the occupant is engaged; or which he permits to be carried on. There must be mutuality of interest in the subject to which the visitors business relates, although the particular thing which is the subject of the visiting may not be for the benefit of the occupant. (3 Elliat RR. 1249; Plunmer v. Dill, 156 Mass. 426; Sesler v. Ralfe Coal Co., 51 W.Va. 318).

On the other hand an implied license is one which is presumed to have been given from the words, acts, or passive acquiescense of the party authorized to give it. Such a license must be established by proof and is not to be inferred from equivocal declarations or acts of the owner of the land (Welden v. Philadelphia RR. Co., 43 Atl. 156).

Thus the owner of a building who leases it to different tenants, and expressly or impliedly reserves portions thereof, such as halls, stariways, porches, elevators for the use in common of different tenants is liable for any personal injury to a tenant, as a person in privity with a tenant, and to defects in the portions of the leased premises of which the landlord so retains control, provided the defect is ascribable to the negligence of the landlord and the tenant or person injured is not guilty of contributory negligence, (Smith v. Marsaw, 230 Ill.App. 382; Crawe v. Birby, 237 Mass. 249; Dwyer v. Wabllard, 205 A.D. 546; Fortunato v. Shewango Co., 278 Penn. 499).

The negligence of the landlord in regard to the safety of the approaches to the leased premises, halls, etc., is based on his failure to use ordinary care to keep such portions of the premises in a reasonably safe condition after having notice or knowledge actual, or constructive of defects therein, or, according to some jurisdictions in as safe a condition as they were in at the time of the execution of the lease rolid upon to establish the duty, (Wheeler v. Sawyer, 219 Mass. 103; Idel v. Mitchell, 158 N.Y. 134; Harkin v. Crumbee, 14 Misc. 439; McCabe v. Hastens, 11 Misc. 272; Williams v. Dickson, 122 Minn. 49).

While it is true that the right of a guest, invitee, or licensee of the tenant or person occupying the premises under the owner to recover against the owner, is no greater than the right of such tenant (Balton v. Independent Order of Odd Fellows, 233 Pac. 273) yet on the other hand the right of such third per-

While it is true that the right of a guest, invitee, or licensee of the tenant or person occupying the premises under the owner to recover against the owner, is no greater than the right of such tenant (Bolton v. Independent Order of Odd Fellows, supra) yet on the other hand the right of such third person to recover against the owner can't be limited by any agreement made between the tenant and the landlord of which such third person was unaware of and did not consent to; there being no privity of contract between such third person and the landlord. This is the natural and logical conclusion following from the rule that a party may not shield himself from liability to a third person for his negligence resulting in injury to such third person, to use reasonable care by stipulating with another party that he is to be relieved from liability for his act. The agreement is enforcible as between the parties to it but not as to third persons (Finegan v. Piercy Contracting Co., supra; Buck v. Standard Oil, 249 N.Y. 595; Robbins Dry Dock v. Navigazione, 261 N.Y.455).

The case at bar (Pierce v. Humnewell, supra) holding that plaintiff was a mere licensee as to the landlord, the invitation to enter being extended by or through the tenant and thus being an invitee of the tenant not of the landlord, was limited as against the landlord to a use of the elevator on the same terms as the tenant is contrary to the weight of authority.

Persons who enter premises on business with tenants are invitees as to the owner (Sutton v. Penn, 238 IllApp.182; Harris v. Perry, 89 N.Y. 308; Konick v. Champneys, 108 Wash. 35; Miller v. Hancock, 2 Q.B. 177).

The same status is occupied by a mailman who went into the building to deliver mail to a tenant, or a physician who is called into the premises (Jones v. Philadelphia Coal Co., 255 Pa. 339). So also as to an expressman who enters on the premises to remove goods for a shipper (Southern Paramount Pictures Company v. Goulding., 24 Ga.App. 478).

In conclusion it seems only logical that the defendant in the case at bar be held liable for negligence. Liability may be predicated on two theories. In the first place, the elevator may be regarded in the same category as a common hallway or staircase in which cases there is imposed a liability on the landlord to use reasonable care in maintaining such in a reasonable safe condition. Such a duty is imposed by law and may not be delegated to another so as to escape liability. In the second place, forgetting the first premise, and assuming the landlord was under no duty originally to keep in repair, by his actually assuming control, furnishing power, and making repairs, by such acts he renders himself liable for negligent injury resulting from such assumption of control.

Eugene H. BeHage

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LIABILITY OF MANUFACTURER FOR DAMAGE TO PROPERTY OF PERSONS NOT IN PRIVITY

The owner of a farm contracted with the Rib Stone Concrete Corporation for the construction and installation in one of his barns of a waterproof water tank.

The defendant was a manufacturer of paints and varnishes, and, among other things, of waterproofing materials. Pursuant to the order of the corporation, defendant furnished two gallons of its product called Hydrocide Colorless Waterproofing and labelled in part, "Do not use near flame." In addition, defendant shipped one gallon of "Hydrocide #889" with which the corporation had expressed a desire "to experiment.....in connection with silos which we erect. The label on this can contained no warning or notice of the inflammability of the contents. The corporation had never used it, and knew nothing about it. In fact, it was a secret preparation containing over fifty percent. benzine and over six percent kerosene. It smelled not unlike paint. It was not only highly volatile and inflammable, but over-exposure to the fumes of burning benzine would cause death.

Construction of silos and of watertanks differs materially on in respect of size. Defendant wrote that its preparation was suitable for waterproofing the interior of silos, and that it could be applied with a brush; but, when so applied to the interiorby an employee of the corporation, the fumes from the preparation came in contact with an ordinary farm lantern, being used for lighting purposes, and caused an explosion and a fire. Plaintiffs, fire insurance companies, are subrogees of the owner whom they recompensed for the loss of his barn.

The jury found that the preparation was an inherently dangerous commodity and that in reason defendant should have anticipated a use near an open flame with a consequent explosion and fire, and injury to person and property. (G.C.P.FIRE ASSN. vs. SONNEBORN SONS. 263 N.Y., 463).

"Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right." (Cardozo Ch.J., in PALSGRAF vs. LONG ISLAND R.R.CO., 248 N.Y.,339).

In the owner here, the defendant says, there was no such right, at least in respect of his property. Concededly, until now, the action for breach of a duty owing, there being no contractual privit has been confined to instances of personal injury. In such cases the liability has been founded in the production and/or the vending of an article or preparation inherently and imminently dangerous, which, without disclosure or reasonable probability of discovery of such fact, is destined for use in substantially its same state of completeness. (MacPHERSON vs. BUICK MOTOR COMPANY, 217 N.Y., 382; THOMAS vs. WINCHESTER, 6 N.Y., 397). Even then, the last cause may be too remote in the chain to be held linked to the first failure of duty. (LEEDS vs. N.Y.TELEPHONE CO., 178 N.Y., 118). In such case liability, if there be any, may depend on the doctrine of proximate cause. (SWEET vs. PERKINS, 196 N.Y., 482; LAIDLAW vs. SAGE,158 N.Y., 73; RING vs. CITY OF COHOES, 77 N.Y., 83.

This is not to say that, of itself, remoteness is any defense. (SCOTT vs. SHEPARD, 2 Wm. Bl., 893). Rather, it is, that, coupled with the intermediate handling or user, there has been a natural deterioration or decomposition so substantially contributing to the danger of longer use that the question of the causa causans might fairly be said to be inextricably divided between the first negligence and the later deterioration. Thus, inthe Buick case above, had the defective wheel, while remaining imminently dangerous, yet withstood the wear incident to the life of a sound wheel, it might seriously be questioned whether the defendant would be liable for an injury happening thereafter. On the other hand, a mislabelled poison (THOMAS vs. WINCHESTER, supra), or a can of explosive (HALLENBECK vs. WANDER & SONS CHEMICAL CO., 197 A.D.,885) does not lose its fatal potency through the lapse of many months or the change of many hands.

This distinction, if any, is not to be confused or misinterpreted. It is not that which is drawn when dealing with spreading fires. (HOMAC CORPORATION vs. SUN OIL CO., 258 N.Y., 462; RYAN vs. CENTRAL R.R., 35 N.Y., 210). Neither is it that of the intervening independent force which severs the privity of causality. (SAUGERTIES BANK vs. DELAWARE & HUDSON CO., 236 N.Y.425). If it exist at all it is an exception within this class of liability; and important only in the rare case, e.g. a long intermediate user, or a substantial change of character.

Otherwise, however, there is a liability; and it is one wholly independent of contract (MacPHERSON vs. BUICK MOTOR CO., supra). There being no privity of contract, the doctrine of implied warrant has no applicability. (CHYSKY vs. DRAKE BRASS CO,, 235 N.Y.468). In fact, unless the complaint sufficiently states a cause of action grounded in negligence, it states nothing. (TURNER vs. EDISON STORAGE BATTERY CO., 248 N.Y., 73). As pointed out in the latter case, (pg. 74), this is not to say that, conceivably, such a transaction might not give rise to a cause of action for deceit. (Citing ROBERTS vs. AUHENSER BUSCH BREWING ASSN., 211 Mass. 449) or one for negligent words. (Citing: INTERNATIONAL PRODUCTS CO. vs. ERIE R.R. CO., 244 N.Y. 331).

There are elements determinative of the wrong. The thing must be of such a nature that in any proper sense it cannot ever be said to have been poorly made: Either it has been well made, or there has been no making. Such would be true of an auto wheel. A steel wheel may be stronger than a wooden one, yet both are wheels if properly made. On the other hand, a defective wheel is something less than one of inferior grade. It is equivalent to no wheel at all, or worse, when there is no knowledge of the defect. Moreover, the danger is greatest in the precise use which was intended.

"Whatever may be the rule applicable to other facts, it is settled that a person, who sells an article which he knows is inherently dangerous to human life, limb, or health, to another perso. who has no knowledge of its true character, and fails to give notic thereof to the purchaser, is liable in damages to a third person who, while in the exercise of due care, is injured by a use of it which should have been contemplated by the seller." (FARLEY vs. EDWARD E. TOWER CO., 271 Mass. 230; KRESICK VS. THORNDIKE & HIX, INC., 224 Mass., 413; GUINAN vs. FAMOUS PLAYERS-LASKY CORP., 267 Mass., 501).

Nor, in the practical application of the rule of liability, can a distinction be drawn between an instrument originally and disastrously defective and one intrinsically perfect but so defectively and dangerously packed as to be, upon leaving the maker's hands, in a condition inherently dangerous to all who put it to its contemplated and intended use. (ROSEBROOK vs. GENERAL ELECTRIC CO., 236 N.Y., 227). Extract of belladonna is more than a mere, though potent, poison when it bears the label of extract of dandelion (THOMAS vs. WINCHESTER, 6 N.Y., 397). It is both a menace to the unsuspecting and a dissolver of suspicions. Care or warning or often both are determinants of this rule of liability.

All this is obvious to the maker. He acts at his peril when probability rather than possibility of injury to life and limb attends his degree of care. No less obvious it must be to him that the use of the thing will be by others than the purchaser.

"If the danger was to be expected as reasonably certain, there was a duty of vigilance imminent." (Cardozo, J., in MacPHERSON vs. BUICK CO., supra, at page 394). It is apparent, of course, that the liability is grounded in negligence. It is not that of an insurer. Absolution from liability still follows upon proof of fulfillment of the duty of reasonable care. (SMITH vs. PEERLESS GLASS CO., 259 N.Y., 292). The difference lies in the amount of care which may be held in fact to be reasonable. There being knowledge of the danger and of the contemplated use, it might well be held that only a high degree of care would be at all reasonable. Again the case may be one where there is violation of a statutory duty and consdquent negligence as a matter of law. Such a one was P.G.POULTRY FARM vs. NEWTON B.P.MANUFACTURING CO., 248 N.Y., 293). Meat scrap manufactured by the defendant contained ground steel wire and produced, upon feeding, an alarming mortality among the ducks of the plaintif the ultimate but not the immediate purchaser. Being injurious to the health of animals the sale of such feeding stuff was prohibited by the Farms and Markets Law. Liability followed irrespective of t elements of ordinary negligence, and it was for an injury to proper rights, which, in such case, came as much within the protection of the statute as those of the person. "Whether the doctrine of commo law negligence founded upon the principles applied in such decision as THOMAS vs. WINCHESTER, supra, and MacPHERSON vs BUICK CO., supra shall be further extended to include damage to property rights as distinguished from personal injuries, may prudently be reserved for the future." (Page 296).

That future is now become the present. The argument is made that the liability imposed on a manufacturer for negligent injury t a third person is an exception to the general rule of privity, one resting, presumably, on the tender regard of the court for the security and health of the person. There is not, it is said, neither should there be, any such exception in respect of things inanimate. Indubitably, such was the law. Nor, despite the opinion in P.G. POULTRY FARM vs. NEWTON BP MANUFACTURING CO., supra, was the situat so unmet or the question so undecided as juridically as well as pru dently to be reserved for the ineluctable future. In the case of THOMAS vs. WINCHESTER, supra, the action was brought in the name of the husband and wife, though only the wife had been poisoned. The joinder was proper under the now quaint but then prevailing theory of unity of a husband and wife. That theory, however, did not prevent the perspicacious trial judge from charging, (page 407), "that if they should find the defendant liable, the plaintiffs in this action were entitled to recover damages only for the personal injur and suffering of the wife, and not for loss of service, medical treatment or expense to the husband, and that the

confined to the actual damages suffered by the wife." Under the law now adjudged by the present case, the husband might properly recover such expenses. And in reason it is justly so. No less inviolate than his person is the property which a person may own. The bounds of personal security are not the limitations of bodily freedom. At least this is so in the absence of a contrary need in behalf of the always paramount public welfare. It is no answer from the mouth of the negligent destroyer of property to say that his fault was lacking in privity and that absolution must still be his because, along with an accompanying that destruction, perhaps enormous, there was not also a loss of life or limb. Whatever might have been the reason for such a rule, it has no place, and has been given none, in the pronouncement by the Court of Appeals on this particular and progressing phase of the law of Torts.

Eugene V. Coffey.

EFFECT OF A REPEALING AMENDMENT ON JURISDICTION OF COURTS

In a recent case before the Supreme Court of the United States (United States v. Chambers, 291 U.S., 217) there was involved a problem which, because it has not appeared before with a national significance, should not be overlooked and is of current interest. Chambers and one Gibson were indicted for conspiring to violate the National Prohibition Act, and for violation of that statute. The indictment was filed on June 5, 1933. At that time Chambers pleaded guilty but prayer for judgment was continued until the December term. On December 6, 1933 Chambers filed a plea in abatement and Gibson filed a demurrer to the indictment each on the ground that the repeal of the Eighteenth Amendment to the United States Constitution deprived the court of further jurisdiction under the indictment.

This was based upon the contention that the ratification of the Twenty-First Amendment to the United States Constitution which was completed December 5, 1933, repealing the Eighteenth Amendment, from which the National Prohibition Act took its force and effect, deprived the court of jurisdiction over the pending matter. Of the fact of ratification of the repealing amendment the court takes judicial notice (DILLON v. GLASS, 256 U.S.368; STATE v. FINSKY, 176 Wis.481).

When a statute which imposes a penalty or punishment is repealed without qualification, such legislative action expresses the will of that body that acts which were offenses under it, committed while the statute was in force, shall no longer be regarded as criminal and shall not be punished under the repealed statute (VINCENTI v. U.S., 272 F. 114; MARESCA v. U.S.,277 F. 727). This is the general rule, based upon the theory that the legislature can invoke penalties and repeal them, and that such repeal acts as a legislative pardon, deprive the courts of any power to enforce such penalties since the grant of authority so to punish was given to th judiciary by the legislature and by the same token can be taken fro it (STATE v. THOMAS, 149 L.A. 654).

This situation has arisen when an existing statute has been re pealed and a new one substituted to take its place. As to acts com mited under the old statute but brought to prosecution under the new statute the courts have said that the old penalty no longer exists. (NORRIS V. CROCKER, 13 How. 429); in the words of the Supreme Court of the United States in U.S.v. TYNEN, (11 Wall. 88), "there can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offense be at the same time in existence. By the repeal the legislative will is expressed that no further proceeding be had under the act repealed."

The rule is well established. It forms and has formed an integral part of Anglo-American jurisprudence. In Hale's PEEAS OF THE CROWN (Vol. 1, p.191) it is said that "when an offence is made treason or felony by an act of Parliament, and then the act is repealed, offences committed before such repeal, and the proceedings thereupon, cannot be proceeded on, after such repeal, unless a special clause in the act of repeal be made, enabling such proceedings to be had after the repeal for offences committed before the repeal." This doctrine has been followed in the United States. (YEATON v. U.S., 5 Cranch 281; SCHOONER RACHEL v. U.S., 6 Cranch

329; COMMONWEALTH v. MARSHALL, 11 Pick. (Mass) 350; COMMONWEALTH v. KIMBALL, 21 Pick. 373; BUTLER v. PALMER, 1 Hill 324; HARTUNG v. PEO., 22 N.Y. 95).

This principle has been said to apply to prosecutions in all stages of pendency. Ifa right is pending, it depends entirely upon the statute. When the statute is repealed, without any saving clause, the court must dispose of the case under the law in force when its decision is given (GULF, COL.,& S.F.RY.v. DENNIS, 224 U.S. 503; VANCE v. RANKIN, 194 Ill. 625; MUSGROVE v. VICKSBURGH & NASH. R.R.CO., 50 Miss. 677; MONTAGUE v. STATE, 54 Md. 481).

It has been applied in a proceeding pending, even after a plea of guilty. (Whitehurst v. State, 43 Ind. 473). Even after convictic judgment has been arrested because of such repeal (HARTUNG v. PEO., supra). In WALL v. STATE, (18 Tex. 683) while an appeal was pending, the statute was repealed and the court discharged the prisoner. This follows since an appeal suspends final judgment and until the appeal is finally determined the conviction is not conclusive (YEATON v. U.S., supra).

Perhaps the most striking example of the extent to which this doctrine is applied is the case of KEELER v. STATE, (12 Mo. 322). In that case Keeler was indicted and convicted. He appealed, and after his cause had been argued in the final appellate court the legislature passed an act repealing the law under which the indictment was framed. This was not called to the attention of the court until after judgment had been affirmed. A motion was made at the same term of court to strike out the affirmance and enter judgment of reversal. This motion was granted, the court stating that since th law had been repealed there was no law at all, by authority of whic the court could affirm judgment of conviction, where the law was repealed pending the appeal.

The leading case in New York dealing with this problem is HARTUNG v. PEO., supra. Hartung was convicted of murder in the first degree. The statute in force when he committed the act for which he was convicted was repealed, and a new statute substituted dealing with crumes punishable by death. He could not be prosecute under the new statute since it increased the penalty by adding confinement at hard labor while awaiting execution. There being no saving clause, the old statute had no force and effect and as to Hartung the new statute was inapplicable.

The means adopted to avoid the inability to punish for unlawfu acts because of repeal of the statute providing the penalty is the use of a saving clause, either in the repealing statute or by a general provision in the law. The use of such a clause expresses the will of the legislature that the courts shall retain jurisdiction of the cause and not be deprived of power tp punish offences committed under the repealed statute. Without such expression of intent the repeal acts as a remission of the penalty. (MARYLAND v. B. & O.R.R.CO., 3 How. 534; YEATON v.U.S. supra; PEO. v. MULFORD, 140 A.D. 716).

Such a saving clause is found in the U.S. Revised Statutes, Section 13 which reads as follows:

"The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or

> liability incurred under such statute unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

Under this the Government in U.S. v. CHAMBERS, supra, alleged that the defendants could be prosecuted. This saving clause does keep alive prosecutions under Congressional statutes (EX PARTE LAMAR, 274 F. 160; GOLDBERG v. U.S, 280 F. 89).

If the case at hand were one of purely Congressional repeal that rule could be applied, but this is a matter involving the Constitution. The powers of Congress are to a certain extent limited. That body cannot expand or extend its constitutional authority. It could and did propose, but could not adopt, a constitutional amendment; it could not vary the terms or effect of the amendment when adopted. There is no saving clause in the Twenty-first Amendment and the one contained in the Revised Statutes, Sec. 13 does not apply. The National Prohibition Act was not repealed by Congress, but by the people. It followed, therefor that the release of the two defendants in this case was the proper disposition of the controversy by the Court.

Harold R. Altus

INSURANCE

RIGHTS OF THE CREDITORS - DEBTOR'S INSURANCE

The recently reported case of STOUDT v. GUARANTY TRUST COMPANY OF NEW YORK (150 Misc. 675) has again raised the question of the rights of creditors in regard to the debtor's insurance. The action in this case was brought by the plaintiff, as administrator of the deceased debtor, to set aside as in fraud of creditors the transfer of certain life insurance policies. The complaint alleged that the policies were taken out payable to the estate of the debtor and that while insolvent and with intent to defraud creditors, the debtors changed the beneficiary and caused the policies to be made payable to his wife and other relatives.

The Supreme Court, New York County, held that this case came under the common law for, since the policy was not at first made out in the favor of a third party, Section 55-a of the Insurance Law did not apply and therefore the plaintiff was entitled to recover the entire proceeds of the policy.

Section 55-a of the Insurance Law provides: "Rights of Creditors and beneficiaries under policies of life insurance. If a policy of insurance, whether heretofore or hereafter issued, is effected by any person on his own life or another life, in favor of a person other than himself, or, except in cases of transfer with intent to defraud creditors, if a policy of life insurance is assigned or in any way made payable to any such person, the lawful beneficiary or assignee thereof, other than the insurad or the person so effecting such insurance, or his executors or administrators, shall be entitled to its proceeds and avails against the creditors and representatives of the insured and of the person effecting the same, whether or not the right to change the beneficiary is reserved or permitted, and whether or not the policy is made payable to the person whose life is insured if the beneficiary or assignee shall predecease such person; provided, that, subject to the statute of limitations, the amount of any premiums for said insurance paid with intent to defraud creditors, with interest thereon, shall enure to their benefit from the proceeds of the policy;..."

Does this section not show the trend of public policy by allowing only so much of the premiums as was paid in fraud of creditors to be recovered by the creditors? The case of GOULD v. FLEITMANN, (188 A.D.759, aff'd 230 N.Y. 759) held that a life insurance policy was a valuable contract constituting property and was therefore governed by the rules affecting the transfer of property. If such a rule is carried out the transfer by an insolvent of his insurance policy will be governed by Section 273 of the Debtor and Creditor Law whereby "Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration."

However, is it not the public policy of this State to allow a husband to provide for his wife and children even though his creditors must to some degree suffer? It is not the policy of this State to take away from those in need and make them public charges and destitute because of debts owed by the deceased.

In a number of jurisdictions an insured might transfer his policies and the proceeds as such could not be taken by creditors of the insured. In DAVIS v. CRAMER (133 A.K.224) a creditor sought to have a transfer to the insured's sister and his son set aside after the death of the insured. The court there held that even though the transfer was voluntary and made at a time when the insured was insolvent, such transfer in and of itself could not operate as a fraud on his creditors, the reason being that no property value, that could be subjected by the creditor to his claim, beyond the cash surrender value of the policy had been transferred and therefore to that sum and nothing more was the creditor entitled.

Even though insolvent at the time when the insured changed the beneficiary from his estate to his wife, the creditors were injured only to the extent of the amount of premiums paid during the two years the policy was in existence (STATE EX REL. WRIGHT v. TOMLINSON, 16 Ind. App. 662).

The principle of providing for the insured's dependents was even further stressed by the courts of Louisiana in its opinion handed down in HEARINGS SUCCESSION (26 La. Ann. 326). Here conditions sought to have the widow of an insured inventory as part of his estate a policy taken out in his own name and transferred to his wife and child. In part the court said: "A man may take out a policy of insurance on his life in the name of anyone, or, having taken it out in his own name, he may.....transfer it to whom he pleases." Thus the defeat of the husband's attempt to protect his wife was avoided. In this same manner the court disposed of the case of ELLIOTT v. BRYAN (64 Md. 368) where creditors sought to inpose their claims upon the proceeds of a life insurance policy. The policy was taken out by the debtor in his own name and then later, while insolvent, assigned it to his wife. It was here held that under the statute, even though the insolvent did not possess other property from which the claims of his creditors could be satisfied, a husband might assign to his wife, free from claim of creditors, any policy of insurance on his life.

New York, however, is not alone in its stand that such a conveyance is fraudulent.

In the case of Ionia County Savings Bank v. McLean (84 Mich., 625) it was held that a policy of life insurance taken out by a man in his own favor became part of his estate and subject to the claims of creditors like his other property. The transfer of such a policy to a daughter when a man is insolvent is illegal and a fraud upon creditors, a distinction being drawn between a policy taken out under the statute for the benefit of the wife and children and one taken out in one's own name, the latter being held a part of the insured's estate, whether the creditors knew of the policy or not.

"The fact that the party was insolvent at the time of the transfer renders the mere voluntary assignment to a wife or children void in law as to creditors, because the debtor has no right to withdraw his property from the liability to pay his debts to the prejudice of his creditors." (CHAMBERS v. MANLOVE, 39 Miss.655).

The taking out of a policy in favor of the insured's father and mother has also been declared void on the ground that if they had been made beneficiaries after creditors claims had arisen the thrasfer would be deemed fraudulent. (LEHMAN v. GUNN, 124 Ala. 213).

It has even been held that when the insured "being indebted to a state of clear insolvency at the time of its life insurance policy, voluntary assignment to his daughters, his act was fraudulent as to his creditors, and void in law, whether made with an intent actually fraudulent or not." (BUNTON v. FARMHOLT, 86 N.C. 260). Previously it was a question of fact for the jury to determine whether or not the fraudulent intent was present (HURLBUT v. HURLBUT, 49 Hun 189). However, Section 273 of the New York Debtor and Creditor law seems to make the transfer fraudulent as a matter of law.

If the State of New York is to continue to decide cases not coming under Section 55-a (supra) by the common law is it not the duty of the courts to protect those for whom public policy demands protection? Since by statute (Sec. 55 Insurance Law) a wife is given the power to insure the life of her husband, it is within the spirit of the statute and the public policy of the State to permit a policy already issued to be assigned to her in the same manner free from the claim of creditors except as to the amount of premium paid by the insolvent within the period of theStatute of Limitations together with the interest thereon. (COLE v. MARPLE, 98 I 11. 58).

Francis A. Bolles.

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